United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

B R I E F F O R A P P E L L A N T

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

413

No. 17,439

JAMES BOSTIC,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From The United States District Court
For The District of Columbia

EDWARD J. SKEENS

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Washington 6, D. C.

ATTORNEY FOR APPELLANT

QUESTIONS PRESENTED

Appellant was convicted of murder in the first degree after a trial by jury. A mandatory sentence of death by electrocution was never carried into effect, because shortly thereafter, appellant was found to be of unsound mind and on May 29, 1940, was committed to St. Elizabeth's Hospital. On April 23, 1951, Harry S. Truman, President of the United States, commuted the death sentence to 99 years' imprisonment. On October 24, 1960, Appellant renewed a motion, previously filed on August 1, 1949, to vacate sentence and ~~for trial~~ or dismissal, which was denied after a hearing that was ordered by this Court. Bostic vs. United States of America (1961) 112 U. S. App. D. C. 17, 298 F2d 678.

Therefore, in the opinion of the appellant, the following questions are presented for decision on this Appeal:

1. Whether the Appellant received a fair and impartial hearing on the merits of the motion to vacate judgment filed pursuant to Title 28, U. S. C., Section 2255.

2. Whether the Appellant established a prima facie case by a preponderence of the evidence, to the effect that Bostic was not mentally competent to stand trial.

3. Whether the Appellee met its burden to establish, beyond a reasonable doubt, that the Appellant was mentally competent to stand trial, notwithstanding the Appellant's prima facie showing of mental incompetency by a preponderence of evidence.

4. Whether the Court should have permitted the introduction of newly discovered evidence and argument on the issue of the Appellant's sanity at the time that the offense was committed.

5. Whether the Court should have permitted the introduction of evidence and argument on the legality of the Appellant's transfer from a mental institution to the Federal Penitentiary.

I N D E X

T A B L E O F C A S E S

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* designates cases chiefly relied upon by Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,439

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B R I E F F O R A P P E L L A N T

JURISDICTIONAL STATEMENT

This is an appeal from the denial, after a hearing, of a motion to vacate sentence and for new trial or dismissal, brought pursuant to Title 28, U.S.C., Section 2255; Title 28, U.S.C., Section 1651, as a proceeding in the nature of coram nobis, and pursuant to Rule 33, Federal Rules of Criminal Procedure. The denial of the motion was incorporated in a written opinion dated July 5, 1962, by Alexander Holtzoff, Associate District Judge for the District of Columbia. Jurisdiction is vested in this Court by virtue of Title 28, U.S.C., Section 1291.

STATEMENT OF THE CASE

The docket entries 1J A 1, 2, 3, 4, 5* reflect that the Appellant was indicted for murder in the first degree on November 12, 1936; that trial by jury commenced on February 8, 1937; that on February 9, 1937, the jury returned a verdict of guilty of murder in the first degree; that the Appellant was sentenced to death by electrocution on March 19, 1937; that a Notice of Appeal was filed on March 24, 1937; that various motions in other proceedings were taken, including a petition for writ of habeas corpus, which was dismissed, and an appeal was noted on May 9, 1939; that an Aprder8on19the a petition for azlunacy inquisition was entered April 22, 1940; that a lunacy inquisition before a jury was held from May 13 through May 20, 1940, resulting in a verdict that the Appellant was of unsound mind, suffering from psychosis and epilepsy; that a judgment of insanity was entered by Judge Letts on May 29, 1940, committing the Appellant to a Government hospital for the insane and suspending the execution of the sentence of death by electrocution until such time as Appellant was restored to sanity 1J A 204; and that the Appellant remained continuously at St. Elizabeth's Hospital until the Superintendent, Winfred Overholser, M. D., filed a letter dated July 7, 1949, with the Clerk of the District Court to the effect that the Appellant was no longer suffering from a psychosis and no longer in need of care and treatment for his mental disorders 1J A 205. The Appellant was discharged from treatment from said hospital on July 21, 1949, 1J A 206. On July 20, 1949, District Judge Alexander Holtzoff entered an order for a lunacy examination of the Appellant and inquiry, with provi-

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* The Joint Appendix of the parties in No. 16,405, in Bostic vs. United States of America, is hereby treated as part of the Joint Appendix in this Appeal pursuant to order of this Court dated December 10, 1962, and identified as Volume 1.

sion that the Appellant be examined and observed by Drs. Joseph L. Gilbert and Amino Perretti of the psychiatric staff of Gallinger Municipal Hospital, in order to determine the Appellant's mental condition as of that time 1J A 207.

On July 25, 1949, Judge Holtzoff appointed John R. Fitzpatrick, Esquire, as counsel for the Appellant 1J A 4. On August 1, 1949, said appointed counsel filed a motion for a new trial upon the ground that the Appellant was insane of the date of the offense and subsequently at his arraignment, trial, and sentence; and by reason of newly discovered evidence relating to defense of insanity, which was not presented at the time of his trial 1J A 208. The docket entries fail to reflect any disposition or hearing on said motion for new trial and the motion was still pending as of October 24, 1960, when the present motion tovvacate sentence was instituted. On October 6, 1949, Drs. Gilbert and Perretti filed duplicate reports concluding that the Appellant was of unsound mind, suffering from undifferentiated psychosis, and recommending that Appellant be committed to St. Elizabeth's Hospital 1J A 209.

On October 10, 1949, a certificate was filed by direction of Judge Alexander Holtzoff noting that a jury was impaneled to inquire into the sanity of the Appellant, and after a hearing, a jury verdict was entered that the Appellant was of unsound mind, and he was again committed to St. Elizabeth's Hospital 1J A 210. On April 23, 1951, a commutation of sentence to imprisonment for ninety-nine years, signed by Harry S. Truman, President of the United States, was filed 1J A 4. Shortly thereafter, at some time not disclosed by the record, and without a finding that the Appellant's sanity was restored, he was transferred and committed to the Federal Penitentiary at Atlanta, Georgia, where he is presently incarcerated.

On February 19, 1960, Appellant's present counsel filed his appearance in the above cause 1J A 4, and on October 24, 1960, the Appellant by his counsel filed a motion to vacate sentence and for a new trial or dismissal pursuant to Title 28, U.S.C., Section 2255, and to grant a new trial pursuant to Title 28, U.S.C., Section 1651, to be considered as a proceeding in the nature of coram nobis. Appellant also incorporated and attached by reference the motion for new trial filed by Court-appointed counsel on August 1, 1949, and incorporated all points and authorities as though restated in the last motion. In the written motion of the Appellant and at oral argument held on March 24, 1961, before Judge Holtzoff 1J A 5, the Appellant contended that the sentence should be vacated and a new trial granted, or, in the alternative, to dismiss the indictment upon the grounds that the Appellant did not possess sufficient mental capacity to consult with his counsel or to understand the nature and gravity of the proceedings instituted against him; that he was not mentally competent to be arraigned, to stand trial, or to be sentenced validly; that Appellant was legally insane at the time of the commission of the offense, due to his imbecility and mental illness; that Appellant was entitled to a new trial on the ground of newly discovered evidence which consisted of medical and lay opinion, to the effect that Appellant was insane at the time of the offense; that such evidence was not uncovered by the Appellant or his trial counsel, and the defense of insanity was not proffered at the time of Appellant's trial in 1937; and that theAppellant was illegally removed from a mental institution in 1951 andtransferred by the Bureau of Prisons to a Federal Penitentiary without a court order or certificate to the effect that Appellant's sanity was restored, although he had been found to be of unsound mind on two occasions by jury trial, in 1940 and in 1949 1J A 211.

On March 30, 1961, District Judge Holtzoff filed an opinion directing that the motion, files and records of the case conclusively showed that the Appellant was entitled to no relief, and the same was denied without a hearing. From such order denying relief, the Appellant duly appealed to this Court on April 27, 1961. This Court reversed and remanded this cause for a hearing. James Bostic vs. United States of America (Decided December 7, 1961, U. S. App. D. C.) 298 F2d 678. After remand, a hearing was held before the United States District Court, Judge Alexander Holtzoff presiding, on June 26, 27, and 28, 1962. The District Court again raled that the Appellant was entitled to no relief and entered an order to this effect on July 5, 1962, and from such order denying relief, the Appellant duly filed his notice of appeal on October 19, 1962. 2J A 106* for consideration by this Court.

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*The Joint Appendix filed by the parties in this cause is hereinafter referred to as Volume 2.

STATUTES INVOLVED

Title 28, U.S.C., Section 2255, provides in part as follows:

> A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be servedupon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate.
>
> * * * * * * * * * * *
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
>
> * * * June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, Section 114, 63 Stat. 105.

Title 28, U.S.C., Section 1651. Writs

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, Section 90, 63 Stat. 102.

Rule 33, New Trial.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based upon the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT OF POINTS

1. The Appellant did not receive a fair and impartial Section 2255 hearing on the merits.

2. The Appellant established a prima facie case of his mental incompetency to stand trial by a preponderence of the evidence.

3. To rebut Appellant's prima facie case, the Appellee failed to establish Appellant's competency to stand trial beyond a reasonable doubt.

4. Appellant is entitled to a new trial due to his insanity at the time the crime was committed.

5. Appellant was transferred to a Federal Prison from a mental institution in violation of due process of law.

SUMMARY OF ARGUMENT

Appellant did not receive a fair and impartial Section 2255 hearing on the merits due to the District Court's bias, prejudice and hostility with regard to the appellant; the appellant's claim; and the appellant's present attorney. The Court considered the motion filed by the appellant as pre - posterous and conceived in the mind of present counsel. As a result thereof the Court unduly restricted the appellant's request for production of evi - dence, denial of a pre-hearing motion for a mental examination, vexatious restrictions upon appellant's counsel in conducting of direct and cross-examination of almost all witnesses, and the treating of two court-appointed psychologists as appellant's wintesses to his detriment. Since appellant is indigent, his expert witnesses from this area were unable to conduct pre-hearing examinations of the appellant who is presently incarcerated at the Atlanta Federal Penitentiary, Georgia. The court refused to grant appel - lant's motion to be transfered to this District for the hearing.

The Court was obviously prejudiced against the appellant's claim due to the long passage of time since the time of trial in 1937.

The files, records, and appellant's evidence established a prima facie claim for relief by a preponderence of the evidence. All expert psycholo - gists agreed that the appellant's highest intelligence quotient has been reached at 77 or 78 on the Weschler Test and 70 on the Stanford-Binet test. According to accepted scales on psychological testing the Appellant's I.Q. together with his mental history reflects that he has been at least a bor - derline moron or border line defective all of his life; and that his level of mental functioning decreases to a state of feeblemindedness or imbecile state when under a severe pressure such as a first degree murder trial or while awaiting execution of the death penalty. Appellant's medical experts are of the opinion that appellant has been a mental defective most of his life and suffering from insanity for many years including the time the offense was committed and at the time of his trial in 1937. These witnesses concluded that the appellant was not mentally able to intelligently consult with his attorney at trial or to understand and appreciate the gravity of first degree murder proceedings instituted against him; and therefore, the appellant was not mentally competent to stand trial in February, 1937.

Only, Dr. Roger Cohen, one government witness gave his opinion that the appellant was mentally competent to stand trial. However, Dr. Cohen's opinion is based on naked conclusions without any supporting medical re - ports, documents, memoranda or data. In his own words, Dr. Cohen assumed the role of " the " key witness and took an unusual personal interest in this hearing negating his impartiality and effectiveness as an expert. He discussed the case with other witnesses and actually influenced the testi - mony of Dr. Klein who had been called by the appellant after being certain

of his favorable testimony. 2 JA 64 Dr. Cohen's opinions fails to support a finding of mental incompetency at all much less beyond a reasonable doubt.

The appellant has established his insanity at the time that the offense was committed and he should be granted a new trial in the interest of jus - tice. In addition, due process of law was not followed and violated when the appellant was removed from a federal mental institution and transfered to a federal penitentiary for service of his ~~sentence~~ without notice or opportunity to be heard on the issue of his mental competency to commence service of his life sentence which was commutted from the death sentence by the President of the United States in 1951.

ARGUMENT

I APPELLANT WAS NOT ACCORDED A FAIR AND IMPARTIAL HEARING ON THE MERITS

a) Personal bias against Appellant's counsel by the District Judge.

The Court's unfairness with regard to Appellant's counsel, precluding a proper attempt to conduct a fair and impartial hearing is exhibited by quptations of the District Judge.

1. "Mr. Skeens, I suggest or may I remind you that this is not a jury trial. The rules of evidence are not strictly applied in such a hearing as this, so you don't add anything either to your client or to assist the Court by popping up with objections all the time. * * *." 2 JA 32

2. "Yourmay resume your seat. You have made your objection and it is overruled. Now you may resume your seat, or else the Marshal will show you your seat." 2 JA 33

3. "You may sit down, Mr. Skeens, I have overruled that objection. Please don't interrupt." 2 JA 17

4. "I do not think you have to ask a witness his age, Mr. Skeens. You can ask him his occupation. I would not ask such a personal question as that." 2 JA 21

5. "No, No; this is your witness. You asked him a leading question."2JA 24

6. "He is your witness you know. Do not cross-examine him." 2 JA 27-28

7. "I am not going to let you spend so much time on background. I suggest you stick to the specific issue from now on until the end of this hearing and do not get away from it." 2 JA 30

8. After counsel offered to make a proffer of proof - "No, you may not. Ask the next question." 2 JA 29

9. As to counsel's manner of voicing objections - "It is not the proper tone, but your manner hasenot been very urbane." 2 JA 44

10. After apology by Appellant's counsel - "I know, but I suggest that your manner might not be quite as blunt as it has been. Very well. I am sure it was not intentional." 2 JA 45

11."The Court is not inviting argument or answers to its comments. Call your next witness. You are getting insolent, Mr. Skeens." 2 JA 39

12. After counsel attempted to develop bias and hostility during cross-examination of Dr. Cohen - "Well, you are not. I do not permit that kind of a question." 2 JA 89

b) Excessive interference and undue restrictive rulings by the District Court.

1. The Court ordered two psychologists to examine Appellant at the Federal Penitentiary, Atlanta, Georgia. Appellant was required to offer their testimony in order to sustain his burdenof proof. However, the Court refused to treat such psychologists as Court's witnesses. 2 JA 19, 20. The Court interrupted counsel's direct examination of psychologist, Dr. Bryan. 2 JA 22, 26, 27 The Court refused to permit Appellant's counsel to ask leading questions, to cross- examine, and otherwise develop evidence in full from Dr. Bryan. 2 JA 24, 27, 28, 38. The Court unduly limited direct examination of Dr. Bryan. 2 JA 22, 24, 25, 27, 28, 29, 30, 36, 44, 45, 47, 89.

The Court allowed Dr. Bryan to evaluate Bostic's trial testimony over objection 2 JA 33, But sustained the same objection to a similar evaluation by Dr. Greene. 2 JA 43

c) The District Court exhibited bias and prejudice toward the Appellant's Claim for Relief.

The Court has repeatedly referred to this proceeding as a formidable task bordering on the fantastic and the bizarre, verbally and in both written opinions 1 JA 214, 2 JA 98, 2 JA 9, 2 JA 29. The Court also

stated that to vacate sentence after a lapse of twenty-five (25) years would be a mockery of justice and that the government could not retry the appellant if a new trial were ordered. 1 JA 218, 2 JA 98; that the Courts have been flooded with Section 2255 applications, 1 JA 220, 2 JA 104; that such motions create heavy burdens on the Courts 2 JA 104; that, in this instance, the District Court suspended the trial of civil jury cases for 1½ days to conduct the present hearing 2 JA 105; and that the Section 2255 proceeding originated in the mind of the Appellant's present counsel. 1 JA219 2 JA 104 Note 6.

However, the record clearly shows that a similar motion was filed by John Fitzpatrick, Esq., on August 1, 1949,a period of thirteen (13) years ago. 1 JA 4 On September 1, 1949, the government filed an opposition, but the motion is still pending according to docket entries herein. 1 JA 4. The motion for new trial filed by Mr. Fitzpatrick, attorney appointed to defend by Judge Holtzoff, contains the same allegations of incompetency and insanity at the time of the offense. 1 JA 208. Present counsel merely restated said motion pursuant to Section 2255.

d) Denial of Pre-Hearing Mental Examination.

The Appellant filed a motion for a complete psychiatric examination in support of the issues herein. 2 JA 1, 2. The motion was denied although inquiry of government counsel was made by a member of this court at argument of the prior appeal. Appellant desired a re-evaluation of Appellant's claim of incompetency by psychiatrists of the U.S. Public Health Hospital, Lexington, Kentucky. Drs. Irving A. Gail, Murray A. Diamond, M. J. Pescor, and Victor H. Vogel; Medical Officer in charge had certified by letters of April 21, 26, 1950, that Bostic " is basically deficient in intelligence." (See brief for Appellee in No. 16,405, at pages 22 and 23) In addition,

evidence could have been obtained concerning Appellant's sanity at the time of the trial and crime.

Considering each above item and its adverse effect upon this entire proceeding, the District Court failed to accord the Appellant a fair and impartial hearing on the merits.

II APPELLANT ESTABLISHED A PRIMA FACIE CASE ON HIS MENTAL INCOMPETENCY TO STAND TRIAL BY A PREPONDERENCE OF EVIDENCE.

a) The Applicability of Constitution and Laws.

The appellant's claim for relief is founded upon Title 28, U.S.C., Section 2255, which authorizes the vacating of sentence and conviction at any time where the prisoner's constitutional rights are infringed upon, or denied, or where sentence is imposed without jurisdiction, or in violation of the constitution or laws of the United States. The requirement of the Fourteenth Amendment is for a fair trial, says the Supreme Court, and that a person may not be constitutionally tried and found guilty at a time when he is insane and not mentally competent to stand trial. Massey vs. Moore (1954) 348 U.S. 105, 99 L. ed. 135, 75 S. ct. 145. "It is axiomatic in modern procedure that one who continues incapacitated by lack of understanding must never be tried or convicted of crime. A trial of Judgment of conviction of such person is without jurisdiction because of lack of due process." Smith vs. United States of America (1959-9th CCA) 267 F2d 210, at 211. Compare Palmer vs. Ashe (1951) 342 U.S. 134, 96 L. ed. 154, 72 S. ct. 191. which involved an imbecile who pleaded guilty without counsel.

This Court has held that the issue of mental competency to stand trial can be raised pursuant to Section 2255, Bishop vs. United States (1955) 96 U. S. App. D. C. 117, 223 F2d 582, vacated and remanded 350 U.S. 961.

A hearing on this issue was ordered by the Court in Bostic vs. United States (1961) 112 U. S. App. D. C. 17, 298 F2d 678.

The quantity and quality of evidence necessary is not specifically set forth in Section 2255 for the granting of relief. Section 2255 merely requires the Court "to determine the issues." Appellant contends that the burden of proof is upon the moving party and it is a "heavy" burden as proscribed by Bishop vs. United States, supra. But, once this burden of proof is satisfied by the prisoner, the Court is required "to determine the issues" by a preponderence of the evidence. In Miller vs. United States (1958) 261 F2d 546, 547, the Fourth Circuit Court of Appeals has held as follows:

> "Because the proceeding under Title 28, U.S.C., Section 2255 is a civil collateral attack upon the judgment of conviction the burden of proof is upon the petitioner to establish by a preponderence of evidence that he did not intelligently waive the assistance of counsel. Davis vs. United States, 8th CCA, 226 F2d 834; McNair vs. United States, 98 U. S. App. D. C. 359, 235 F2d 856, cert. den. 352 U. S. 989, 77 S. ct. 389, 1 L. ed.2d 368; McKinney vs. United States 93 U. S. App. D. C. 222, 208 F2d 844; Hearn vs. United States, 7th CCA, 194 F2d 647, cert. den. 343 U. S. 968, 72 S. ct. 1064, 96 L. ed. 1364."

b) Prima Facie incompetency to stand trial.

1. Direct Evidence.

1. Direct Evidence. The record discloses that only one witness, Frank Martin, was present and an eye witness when the crime was committed and when Bostic testified at his trial. Martin was of the opinion that the Appellant was of unsound mind at the time the crime was committed and that Appellant did not testify sensibly at his trial. 1 JA 64 through 71.

2. Opinion Evidence by Lay Witness. Nineteen lay witnesses testified at the 1940 Lunacy Inquisition to the effect that the Appellant was of unsound mind and suffering from epilepsy from the time of his birth, con-

timuing through his early childhood, as a teenager and later as an adult while employed as a laborer in the District of Columbia. 1 JA 18 through 94 inclusive.

3. Judicial determination of Insanity in 1940.

At the 1940 Lunacy Inquisition, District Judge Letts instructed the jury that it was their function to decide whether the epileptic condition produced the mental incapacity. 1 JA 203. The Court also advised the jury that the legal criteria for insanity was not the right or wrong test, but whether the appellant had the ability of rationally assisting in his own defense. 1 JA 204.

The Lunacy Jury then returned a verdict on May 20, 1949, to the effect the Appellant was of unsound mind suffering from psychosis with epilepsy. 1 JA 3. (emphasis added) This verdict, by implication, accepts the testimony concerning epilepsy by the nineteen lay witnesses as true. This verdict forecloses the government's contention that the appellant suffered from a prison psychosis occuring after trial and due to the death sentence and numerous stays of execution.

4. Judicial determination of Insanity in 1949.

By letter dated July 7, 1949, the Superintendent of St. Elizabeth's Hospital reported to the Court that Appellant had recovered his sanity and was no longer in need of care or treatment. 1 JA 205 On July 20, 1949, the District Court entered an order for Lunacy Examination and inquiry; and that mental examinations be conducted and reports be filed by two (2) psychiatrists. 1 JA 207. Pursuant thereto, Drs. Amino Perretti and Joseph L. Gilbert reported that the Appellant was of unsound mind, suffering from undifferentiated psychosis. 1 JA 209. Dr. Gilbert reported that the Appellant's illness consisted of "toxic, organic, epileptoid and situational

factors associated with Mental deficiency." 1 JA 209 (emphasis added) The jury returned a verdict of unsound mind on October 6, 1949, 1 JA 210.

The conclusions of Dr. Gilbert and the two jury verdicts forecloses the government's contention that Bostic never suffered from epilepsy particularly while incarcerated during the period commencing 1940 through 1949. More important Dr. Gilbert considered the Appellant to be mentally deficient at the time of his examination which was no doubt based largely upon Bostic's history and records at St. Elizabeth's Hospital.

5. Evidence of mental deficiency and insanity at time of trial preponderates in favor of Appellant.

The District Court ordered psychological examinations by two psychologists on May 11, 1962. 2JA3. Dr. James E. Greene, by letter of June 15, 1962, reported that Appellant scored an I. Q* of 70 and classified him as a Borderline Moron according to Stanford Binet Intelligence tests. 2 JA 5,6,7.

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* Appellant's counsel was prevented from questioning psychologists on accepted standards by the American Association on Mental Deficiency, 2 JA 27. To aid this Court the following scales which counsel attempted to develop at trial are presented as the aforesaid accepted standards:

WESCHLER ADULT INTELLIGENCE SCALE

Intelligence Quotient	Classification
130 & above	Very Superior
120 - 129	Superior
110 - 119	Bright Normal
90 - 109	Average
80 - 89	Dull Normal
70 - 79	Borderline Defective
69 & below	Mental Defective

STANFORD BINET INTELLIGENCE SCALE

Intelligence Quotient	Classification
140 & above	Very Superior
120 - 139	Superior
110 - 119	High Average
90 - 109	Normal or Average
80 - 89	Low Average
70 - 79	Borderline Defective
30 - 69	Mentally Defective

HUTT and GIBBY

Intelligence Quotient	Classification	Mental Age
50 - 70	Moron	8 - 12
20 - 50	Imbecile	3 - 7
below 20	Idiot	below 3

Frederick P. Watts, a clinical psychologist for approximately 30 years, advised that he would consideraa person scoring an I. Q. of 70 on the Stanford-Binet Test as mentally defective. (2 JA 61.)

Dr. Lawrence Leonard Bryan testified that he found that Bostic scored an I. Q. of 77 on the Weschler Intelligence scale; that psychologists disagree whether an I. Q. of 77 is classed as a borderline moron with some saying this level is the lowest level of normality, and others saying that it is the highest level of mental deficiency; that his preference is to not use either category, just merely inferior intelligence. 2 JA 30. However, it must be noted that the Weschler Adult Intelligence Scale classified an I. Q. of 70 to 79 as "borderline defective."

In his report dated June 15, 1962, Dr. Bryan stated that Bostic " is handicapped by faulty judgment, poor reasoning ability, and very limited insight"; that "it is unlikely that he could make a very good adjustment in a complicated urban environment in which he would have to make numerous important decisions without assistance from others." 2 JA 4. Dr. Bryan stated that in his opinion a person's I. Q. does not ordinarily change very much one way or the other throughout one's lifetime. 2 JA 35. Dr. Bryan also stated that he could not give an opinion as to Bostic's competency to stand trial or his ability to intelligently consult withcounsel.2 JA 30.

Dr. Margaret Ives testified from records of St. Elizabeth's Hospital to the effect that Dr. Kendig, chief psychiatrist, performed a Stanford-Binet test on July 6, 1940, and found that Bostic had an I. Q. of 44 and a mental age of six years and eight months. 2 JA 72. Dr. Ives performed the Weschler Test in 1947 and found Bostic's I. Q. ratings at 78, revised to present standards. 2 JA 77. Dr. Ives did not testify concerning Bostic's competency to stand trial; however, she stated that it was likely that

Bostic's functional intelligence was reduced while under strain in the courtroom facing a charge of first degree murder; that Bostic's functional intelligence and ability to reason could be close to the 1940 I. Q. of 40; and that it has improved to an extent of mental age of about five (5) years since 1940. 2 JA 77, 78. Curiously enough, Dr. Ives testified that as far as she could tell, Bostic was not mentally ill or psychotic in 1947, although Drs. Gilbert and Perretti found Bostic of unsound mind in 1949. 2 JA 74.

Dr. Ernest Y. Williams testified that Bostic was suffering from epilepsy with psychosis and had shown evidence of mental deficiency in February of 1937; and, therefore, appellant was not capable mentally to understand the proceedings instituted against him or to be of any help to his lawyer although able to talk. 2 JA 12. Dr. Williams concluded that Bostic had an history of epilepsy since about age two or four and was suffering from psychosis prior to 1937 because "his mental deficiency wasn't something that he put on. That is something you are endowed with by nature. You are either born with or (sic.) it or you don't have it when you come into this world. And apparently he was born with it, so he just had that at the time of this particular crime." 2 JA 13

Dr. Claude P. Carmichael testified that Bostic was not mentally competent to assist his attorney or to understand the nature of first degree murder proceedings instituted against him. 2 JA 49. Dr. Carmichael advised that Bostic was an imbecile from birth; that he suffered epileptic seizures "which further weakened his mentality; and I thought that due to both of these things, that he was incapable of rendering much help to his lawyers at the time of his trial." 2 JA 50.

Frederick P. Watts, P.H.D., a clinical psychologist for almost 30 years, testified that Bostic was unable to understand the nature of first degree murder proceedings nor was he mentally competent to adequately assist his attorney in 1937; that Bostic was under severe pressure at the trial; and that appellant has been suffering from a mental defect probably all of his life . 2 JA 59. In response to the Court's question, Dr. Watts indicated that too much confidence cannot be placed upon a particular I. Q.; that there is no exact level of intelligence, but only a range of standard error of measurement. 2 JA 60.

Under cross-examination, Dr. Watts related that although he obtained an I. Q. level of 41 in 1937, that Bostic's normal level was higher, but "* * * it seems that there is some consistency in the behavior of this individual. It seems under pressure he functions at a defective level; and he was under pressure, certainly, in 1937, when he was being tried for murder." 2 JA 61.

At the 1940 Lunacy Inquiry, Dr. Watts testified that he administered the 1937 Stanford revision of the Binet-Simon scale to Bostic; that appellant's basal mental age was five years, the level at which he passed all tests; that Bostic passed three tests at age six, one test at age seven, and two tests at age eight; and that this test resulted in an Intelligence Quotient of 41 and a mental average age of six years and one month. 1 JA119. On Cross-examination, Dr. Watts cogently explained some of the tests and Bostic's performance on them. 1 JA 121, 122, 123, 124, 125, 126. Dr. Watts indicated that lack of education has no relationship to mental deficiency; and that Bostic could not distinguish right from wrong except in a situation comparable to one in which a six or seven year old child could distinguish between right and wrong. 1 JA 121

Dr. Elmer Klein was unable to say whether Bostic was able to assist his attorney or to understand the trial proceedings; that Bostic's level of intelligence was diminished due to his mental illness; and that the mental intelligence of Bostic during his trial in 1937 in all probability was an I.Q. of 70 as indicated by an examination conducted in June 10 1962.2JA 66, 67.

At the 1940 Lunacy Inquisition, Dr. Klein testified that Bostic is a feeble-minded individual with a mental age between six and seven years based upon psychiatric and psychological tests; that Bostic has suffered from epilepsy from early childhood; and that Bostic was suffering from psychosis associated with feeblemindedness. 1 JA 159. Dr. Klein indicated that Bostic gave indications of very low mentality because he thought his attorney was working against him; and that Bostic was not only indifferent but actually antagonistic or suspicious of the motives of his attorney. 1 JA160. Dr. Klein observed that a diagnosis of epilepsy is very largely determined by the history rather than by any direct examination of the person 1 JA 162; and that the testimony of the 19 lay witnesses concerning Bostic's mental condition would be taken into account in making a diagnosis. 1 JA 163.

From the foregoing, it is abundently clear that the Appellant was not mentally competent to stand trial or to assist and consult with his attorney.

III THE GOVERNMENT FAILED TO ESTABLISH THE APPELLANT'S COMPETENCY TO STAND TRIAL

a) Applicable Law

It is too clear for argument that a prima facie case of the Appellant's incompetency to stand trial has been established by a preponderence of the evidence. Section 2255 does not specify that the burden is upon the government to establish the Appellant's competency to stand trial beyond a reasonable doubt or otherwise in rebuttal of the Appellant's prima facie case of incompetency. Section 2255 requires only that notice be served upon the United States Attorney

unless the motion, files and records of the case conclusively show that the prisoner is entitled to no relief.

Appellant respectfully contends that the burden upon the government to rebut a prima facie case of a constitutional violation beyond a reasonable doubt should be the rule of law in this case. It has been judicially declared that a constitutional violation of due process of law occurs when a defendant is subjected to the hazards of trial when not of sound mind, or otherwise not mentally competent to stand trial. Research fails to disclose any authority on the issue of burden of proof in a Section 2255 proceeding.

In an identical proceeding to determine the issue of mental competency to stand trial except that that proceeding was initiated pursuant to Title 18, Section 4245, District Judge Keech declared: "In the instant case, even assuming the burden of proof is upon the government and that it must prove defendant's sanity at the time of trial beyond a reasonnable doubt, this Court has no doubt and finds that the defendant at the time of trial was mentally competent * * *." United States vs. Fooks (DCDC 1955) 132 F. Supp. 533, 535(emphasis original). On the issue of Burden of Proof this Court held: "It is unnecessary to resolve these problems as the rulings on the point in the instant hearing were favorable to Appellant." Fooks vs. United States (1957) 100 U. S. App. D. C. 348, 246 F2d 629, 633.

By analogy, Appellant contends that therule of "Beyond a reasonnable doubt" where sanity is raised as a trial defense applies similarly to the government in a Section 2255 hearing. The Fourth Circuit Court of Appeals has a recent occasion to consider sufficiency of evidence on a defense of insanity at trial. The evidence primarily consisted of memory lapse

of the defendant and psychiatric opinion that the defendant was a moderate moron with an intellectual age of 7 to 9 years and an emotional age between 5 and 8 years and possessed a diminished capacity far below average. In reversing the conviction and granting a new trial, chief Judge Sobeloff wrote in Hall vs. United States (1961) 295 F2d 26, 27, as follows:

> While the initial presumption is that a defendant in a criminal prosecution is sane, it is settled law that one 'some evidence' is introduced ' that will impair or weaken the force of the legal presumption in favor of sanity,' it then becomes the Government's burden to prove sanity. "(T)he fact of sanity, as any other essential fact in the case, must be established to the satisfaction of the jury beyond a reasonable doubt." This is the holding of the Supreme Court in Davis v. United States, 1895, 160 U.S. 469, 486-487, 16 S.Ct. 353, 40 L. Ed. 499; 1897, 165 U.S. 373,378, 17 S.Ct. 360, 41 L.Ed. 750, and so it has been interpreted and followed in the lower federal courts."

This is also the rule followed in the District of Columbia. Tatum vs. United States, (1951) 88 U. S. App. D. C. 386, 190 F2d 612, 615.

b) Evidence of Competency produced by the Government.

Only three witnesses were called by the Appellee. The Government did not call trial participants who are still available, namely, Roger Robb, the prosecutor; and the defendant's trial attorney, Joseph Sitnick, whom the District Court considered a competent witness. 2 JA 100. Of the three witnesses, Dr. Margaret Ives did not express her opinion on Appellant's competency to stand trial. 2 JA 72, 73, 74, 75.

Dr. David J. Owens, a witness called by the government, never saw nor examined the Appellant. His testimony was based upon a review of medical records at St. Elizabeth's Hospital. Dr. Owens testified that he would be unable to determine one's competency at trial, a period of twenty-five years later without having conducted an examination. Dr. Owens gave his impres-

sion that Bostic was mentally competent to stand trial, but this impression was based upon a hypothetical question propoundedd by the government consisting of two insufficient assumptionsonly - a) that Bostic was examined by a competent psychiatrist three days prior totrial, and b) that three years later he was psychotic with an I. Q. of 41. 2 JA 80, 81.

Dr. Roger S. Cohen testified that he examined Bostic three days prior to trial on February 5, 1937; and that in his opinion Bostic understood the first degree murder charge and that the Appellant could rationally ask and answer questions, 2 JA 86. Dr. Cohen did not specifically testify that Bostic was mentally competent to stand trial.

In addition, Dr. Cohen had no memoranda or notes to refresh his recollection. His testimony was given solely from ememory as to what he did in 1939. Dr. Cohen testified as to his routine in conducting mental examinations but he notes: "Now that was my routine. I do not pretend to say that I can remember doing every one of these things to Bostic, but I have every reason to believe that I went through my usual routine." 2 JA 85.

On cross-examination, Dr. Cohen could not recall which tests Bostic failed that he had administered to him nor could he pretend to remember.2JA95

Dr. Cohen could not recall how much time he spent in examining Bostic in 1937. 2 JA 82. Dr. Cohen indicated he performed a psychological test to Bostic, but he did not give any results such as I. Q., basal age, or mental age.

Indirect examination, Dr. Cohen said he remembered "most distinctly" Bostic's story of the slaying and "I would like to say that I remember his telling me he met Tuckson in a liquor store at 14th and L Street,"; and that Tuckson used an abusive term meaning he had incestuous relations with his mother. 2 JA 86. Appellant contends that it is incredible for any person

to

to distinctly recall such conversation in minute detail without a memorandum or report on the incident which occurred twenty five years prior thereto. On cross-examination Dr. Cohen only recalled that Bostic was smart, keen and alert, as to his mental condition and the argument and fight as related by Bostic to him. Then Dr. Cohen said, "I don't pretend to remember more than that, but you can't take that away from me." 2 JA 92. How could Dr. Cohen recall"14th and L Street" after all these years? More incredible is Dr. Cohen's view that Bostic was unusually alert and keen and a smart guy when Drs. Bryan and Greene reported in 1962 that Bostic performed tasks with difficulty and required encouragement. 2 JA 92.

Appellant respectfully contends that Dr. Cohen's testimony is insignificant in view of his bias, prejudice and hostility toward Appellant's counsel; and that Dr. Cohen's testimony consisted of a favorable summary of the government's contentions which the witness had heard during the course of the three-days' hearing. Dr. Cohen admitted hostility on cross-examination toward appellant's counsel; admitted preparation of his testimony; admitted seeing reports of Atlanta psychologists, and discussing their testimony; and admitted he considers himself an important witness. 2 JA 90.

Dr. Cohen challenged Appellant's counsel to decide how active he was in this case. 2 JA 89

In conclusion, Appellant contends that all Dr. Cohen remembers is his testimony at the Lunacy Hearing which was that Bostic was of sound mind. 1 JA 198. Dr. Cohen could not have rmemebered more with memoranda, reports or notos. Asstated by Circuit Judge Washington in this Court's opinion of December 7, 1961, Dr. Cohen gave only his naked conclusion, did not explain it, gave no data to support his diagnosis and could not disclose the extent of his examination which lasted about an hour on one occasion.

By comparison, it is interesting to note the government's position in Bishop vs. United States 96 U. S. App. D. C. at 120, 223 F2d at 585. There the United States Attorney had taken the precaution to have a psychiatrist examine Bishop a few days before trial who made a detailed report in writing concluding that Bishop had no delusions, hallucinations, nor anything that would be suggestive of a mental disorder. Nevertheless, the Supreme Court reversed and ordered a hearing on the Bishop sanity at the time of trial. 350 U. S. 961 (1956). Upon remand, Bishop relied on the psychiatric evidence of Dr. Winfred Overholser who had not seen or examined Bishop until three years after trial and conviction. District Judge Tamm vacated the conviction and awarded a new trial holding that Bishop was not mentally competent to stand trial in 1937, a period of 19 years later when Judge Tamm heard the evidence. (See District Court filed Criminal Case No. 62,549 - 1956).

Upon the foregoing, Appellant respectfully contends that the Government has failed in its burden to prove beyond a reasonable doubt that the appellant was mentally competent to stand trial. Finally, aside from any burden of proof, the conclusion is otherwise by an overwhelming preponderence of the evidence.

IV APPELLANT SHOULD HAVE BEEN PERMITTED TO SHOW INSANITY AT THE TIME OF THE CRIME.

If a defendant is not mentally capable of assisting his attorney intelligently, he certainly is not capable of insisting that his court-appointed counsel assert either the defense of insanity or, if not insane, that Bostic lacked sound discretion and reasoning as required by law before a first degree murder conviction is justified. Bostic was not

capable of doing so due to his mental incapacity and the availability of this defense cannot be the criteria for a new trial. The problem of the insane defendant and the relationship of due process of law accorded at his trial has been well explained by the Supreme Court in Massey vs. Moore (1954), supra. The failure of counsel to assert the defense of insanity may be ineffective assistance of counsel and a ground for new trial pursuant to Section 2255, says Circuit Judge Miller in a dissenting opinion at page 875 in Blocker vs. United States (1960) 110 U. S. App. D. C. 41, 288 F2d 853. In an earlier case, Blocker asserted a defense of insanity at his trial which was rejected by the jury. One month after conviction, counsel filed a motion for a new trial due to a new medical classification on insanity involving sociopathic personality. This Court awarded a new trial in the interest of justice. Blocker vs. United States (1959) 107 U. S. App. D. C. 63, 274 F2d 572.

Furthermore, this claim is not an afterthought of present counsel because a motion was filed on this same ground on the first day of August, 1949, by appointed counsel, John R. Fitzpatrick, Esq., which had never been decided. 1 JA 208. The refusal of the District Court to entertain this motion was error. 2 JA 8, 9, 10. Rule 33, Federal Rules of Criminal Procedure, authorized such relief at any time in the interest of justice. This relief is also authorized by the "all writs" statute, incorporating Coram Nobis relief. Title 28, U.S.C., Section 1651.

V THE APPELLANT WAS ILLEGALLY TRANSFERRED FROM A MENTAL INSTITUTION TO A FEDERAL PENITENTIARY

This contention was dismissed by the District Court without a hearing. 2JA 10. The District Court properly noted that the Appellant was adjudged to be of unsound mind of May 29, 1940; and that a second hearing was held

before Judge Holtzoff on October 6, 1949, which resulted in a jury verdict that the Appellant was still of unsound mind, and he was recommitted to a mental hospital 1 JA 216. Judge Holtzoff then noted as follows: " On April 17, 1951, President Truman commuted the death sentence to imprisonment for 99 years. Eventually, the defendant was found to have been restored to sanity and was transferred to the Atlanta Penitentiary where he is now serving his sentence."1 JA 217.

However, there is no record showing that the Appellant had been restored to sanity. There is no showing in the record that any judicial or medical determination on such issue had ever been made since the presidential commutation. It is interesting to note that Title 18, U. S. C. Section 4241, effective June 25, 1948, provides that, where persons charged or convicted of offenses against the United States are committed to a mental institution, they are to be kept there until in the judgment of the superintendent of said hospital, the prisoner has been restored to sanity. Since the Appellant was transferred to the Atlanta Penitentiary in 1951, it appears that the spirit, if not the letter, of Section 4241 has been violated.

Appellant earnestly contends that such illegal commitment constitutes a violation of his constitutional rights, as provided by the Due Process of Law Clause of the Fifth Amendment and the Cruel and Unusual Punishments Clause of the Eighth Amendment.

A prisoner, validly incarcerated in one prison, may invoke the writ of habeas corpus to obtain a hearing to test the validity of his transfer to a State hospital for the insane maintained at another penal institution according to the Court of Appeals of New York. The Court reversed an

order which denied the writ solely on the ground that the place of confinement may not be challenged by habeas corpus. Conceding that, under ordinary circumstances, a mere transfer, as distinguished from a commitment for insanity, is purely an administrative matter, and that a prisoner has no standing to choose his place of confinement, the Court declared that "we do not feel that the courts should sanction, without question, removals in cases of allegedly insane prisoners, which can conceivably be uncontrolled and arbitrary. * * * and further restraint in excess of that permitted by the judgment or constitutional guarantees should be subject to inquiry." People ex rel. Brown vs. Johnston, N. Y., April 27, 1961; opinion by Associate Judge Adrian P, Burke.

C O N C L U S I O N

Upon the foregoing evidence and authorities presented, the Appellant respectfully prays that the judgment and sentence heretofore imposed be vacated and set aside and a new trial ordered upon the first degree murder indictment, based upon the overwhelming showing, pursuant to Section 2255, to the effect that the Appellant was not mentally competent to properly assist in his defense and insane at the time of his trial.

Respectfully Submitted,

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ATTORNEY FOR APPELLANT

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17439

JAMES BOSTIC, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
OSCAR ALTSHULER,
BARRY SIDMAN,
Assistant United States Attorneys.

No. 17439

QUESTIONS PRESENTED

Pursuant to 28 U.S.C. § 2255 appellant was heard in the District Court in 1962 on his claim that he was incompetent to stand trial in 1937, when he was convicted of first degree murder.

In the opinion of appellee the following questions are presented:

1. Did appellant establish by a preponderance of the evidence that he was incompetent to stand trial in 1937?

2. Did appellant receive a fair hearing in the District Court?

3. Did the District Court properly decline to determine appellant's sanity at the time of his crime, and the legality of his transfer from St. Elizabeths Hospital to Atlanta Penitentiary?

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TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

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UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant moved the District Court on October 24, 1960 to vacate the sentence resulting from his 1937 conviction of first degree murder. Pursuant to this Court's decision of December 7, 1961 he was heard in the District Court on the issue of his competency to stand trial in 1937. *Bostic* v. *United States*, 112 U.S. App. D.C. 17, 298 F. 2d. 678. In an opinion filed July 6, 1962 the District Court, per Holtzoff, J., denied appellant's motion. This appeal followed.

Appellant was convicted of first degree murder in 1937 and sentenced to death (1 J.A. 1).[1] He appealed, unsuccessfully. *Bostic* v. *United States*, 68 U.S. App. D.C. 167, 94 F. 2d 636 (1937), *cert. denied*, 303 U.S. 635 (1938). A petition for a writ of habeas corpus, alleging incompetency of counsel and a defective indictment, was thereafter filed and dismissed. *Bostic* v. *Rives*, 71 U.S. App. D.C. 2, 107 F. 2d 649 (1939), *cert. denied*, 309 U.S. 664 (1940). In the period 1937–1940 appellant's execution was stayed twenty-one times (1 J.A. 1–3).

[1] The symbol 1 J.A. refers to the joint appendix in No. 16405 which is part of the record on appeal pursuant to this Court's order of December 10, 1962. The symbol 2 J.A. refers to the joint appendix in No. 17439.

In 1940 appellant successfully petitioned the District Court for a lunacy inquiry, and on May 29, 1940 was adjudged insane and committed to St. Elizabeths Hospital (1 J.A. 204). The execution of his sentence was suspended until his return to sanity (1 J.A. 204). In 1949 he was again adjudged of unsound mind, pursuant to a lunacy inquiry ordered *sua sponte* by Judge Holtzoff (1 J.A. 4, 210). In 1951 his sentence was commuted by the President to ninety-nine years' imprisonment, and shortly thereafter, he was transferred from St. Elizabeths to the Federal Penitentiary in Atlanta, Georgia, where he is presently incarcerated (1 J.A. 4, 217).

On February 19, 1960 appellant's present counsel entered an appearance in the District Court, limited to a proposed filing of a motion to vacate judgment pursuant to 28 U.S.C. § 2255. On October 24, 1960 appellant's counsel filed a motion to vacate appellant's sentence and for a new trial or dismissal on the grounds that appellant was not criminally responsible when he murdered in 1936 and that he was not competent at the time of his trial (1 J.A. 211–13). Judge Holtzoff denied the motion without a hearing (1 J.A. 214–20). This Court set aside Judge Holtzoff's order, and remanded the case "for a hearing on the issue of Bostic's competency to stand trial." *Bostic* v. *United States*, 112 U.S. App. D.C. at 20, 298 F. 2d at 681. The Court rejected other contentions of appellant, such as his claim of entitlement to a new trial without the necessity of a hearing, and his challenge to his transfer from St. Elizabeths to the Atlanta Penitentiary. *Ibid.* Judge Burger, in dissent, was of the opinion that the District Court had not abused its discretion in denying appellant a hearing.

Appellant's three day Section 2255 hearing commenced on June 26, 1962. Appellant produced six witnesses, and the Government produced three. Two of appellant's witnesses were psychologists who had tested appellant prior to the hearing pursuant to an order of the District Court, which order had been prompted by appellant's March 7, 1962 motion therefor. Appellant's motion requested "a complete mental, psychological and psychiatric examination" (2 J.A. 1, 2). A psychiatric examination of appellant was not ordered.

The District Court denied appellant's motion to vacate sentence on July 6, 1962 (2 J.A. 97). In arriving at its decision, the Court considered the testimony and reports of witnesses at the earlier lunacy inquiries and the 1962 hearing, and the testimony of appellant during his 1937 trial. The District Court declined to rule on appellant's sanity at the time of his crime, or the legality of appellant's transfer to Atlanta Penitentiary (2 J.A. 9, 10). *United States* v. *Bostic*, 206 F. Supp. 885 (D.D.C. 1962).

The evidence before the District Court on the issue of competency

A. The testimony of appellant in 1937

On appellant's trial, Government witnesses testified that, at about ten in the evening on October 8, 1936, appellant accosted a young woman whom he had never met and was rebuffed by her (Tr. of Trial Proceedings, pp. 24, 25, 45–46). After purchasing some beer he approached the girl and the deceased, a youth of 16 years, who was a stranger to appellant, and spoke in an uncomplimentary manner to the deceased in the presence of the girl (*id.*, pp. 31, 26, 27, 46, 48). He was again rebuffed (*Ibid.*). A few minutes later he again approached the deceased and the girl and was rebuffed (*Ibid.*). Whereupon he drew a pistol and shot three times, twice at the deceased and once at the girl (*Id.*, p. 28, 46–47).

Appellant took the stand, and corroborated the testimony of Government witnesses, except that he maintained that he shot in self-defense (1 J.A. 6–10). He testified that he was 24 years old; that he had lived in Washington for four years; that on October 9, 1936, he lived at No. 14 L Street, N.W.; that on the evening of October 9, he got off from work at about seven o'clock; that he went home and was lying across the bed, when Frank Martin came in; that appellant then went down to the liquor store and bought a half pint of whisky, and then appellant, Frank, John Weaver and Edward Stevens drank the whiskey in the alley; that appellant then went to the liquor store to buy two cans of beer; that as he was going into the store, he spoke to a girl, and she said to him, "Go to H"; that

the appellant then said, "Gee! lady. You have got a nasty mouth," and then he walked into the store, got the beer and came out; that when the appellant came out of the store, he saw the girl standing with the deceased and another girl; that the appellant then said to the deceased, "Mister, is that your wife?"; that the deceased said "No; that is my sister. What about it? I will back up anything she said"; that the appellant then said, "Oh, you are upholding her devilment?"; that the deceased then said he would back her up on anything she would say; that she was his sister and woman both; that the appellant then said, "Well, Mister, you are looking for trouble"; that then the deceased cursed him, and appellant walked up ahead of the deceased and the girls to the corner of the alley; that then appellant proceeded ahead to No. 14 L Street and stopped; that then the deceased came out in front of appellant and stopped and cursed appellant again; that appellant cursed him in return; that the deceased then said to appellant, "You are supposed to be that little bad so-and-so"; that then appellant said, "No you are supposed to be the bad one"; that then the deceased grabbed his pocket for his knife or razor, or whatever he had; that then appellant handed the beer to one of the boys and backed up, and when the deceased made for appellant, appellant took out his pistol and shot the deceased, firing three shots (1 J.A. 6–8, 10).

At the trial appellant's statement to the police upon his arrest was admitted and it substantiated his testimony (Tr. of Trial Proceedings, pp. 88–92). It was also shown that the next day appellant went to work and, being informed that "things were getting hot," fled the jurisdiction for about ten days (Id., pp. 91–92). Before leaving he threw his gun into the river (Id., pp. 83, 93).

B. The testimony of witnesses at the 1940 lunacy inquiry

On appellant's behalf nineteen lay witnesses, all friends, and acquaintances of appellant and his family, testified to a history of fits and convulsions and hallucinations since his infancy. They uniformly opined that he was insane (J.A. 18–34, 38–100). Appellant's jail superintendent testified to appellant's record as an unruly prisoner (1 J.A. 35–37). Appellant

then produced four doctors and an instructor in psychology. *Drs. Carmichael, Watts, Klein,* and *Williams* testified to appellant's epilepsy, low mental age, and insanity. These witnesses testified at the 1962 hearings; their testimony at both hearings will be summarized *infra,* p. 7. *Dr. Whittington H. Bruce,* a general practitioner, testified for appellant. His two examinations of appellant led him to believe that appellant had a low grade mentality, that when appellant suffered epileptic attacks, if in fact he did suffer such attacks, he could not distinguish right from wrong (1 J.A. 147–57).

The Government produced the following witnesses at the 1940 inquiry:

Joseph Sitnick, Esq., was appellant's trial counsel. Prior to appellant's trial in 1937 he had tried fifty criminal cases. Six were homicides, one of which was a first degree murder case; Mr. Sitnick won all six. Mr. Sitnick testified that he consulted with appellant before trial and was able to prepare a defense from the information appellant communicated to him. Moreover, he conferred with several of the persons who subsequently testified as lay witnesses at the 1940 lunacy inquiry. Not one told him that appellant was insane, epileptic, or convulsive. He was personally satisfied that appellant was of sound mind, but, "to be more certain," he had appellant examined prior to trial by an expert psychiatrist, Dr. Roger D. Cohen. Dr. Cohen reported to Mr. Sitnick that appellant was of sound mind. (1 J.A. 166–68.)

Dr. Robert Cohn, a biophysicist, administered an electroencephalogram to appellant in 1940. The test, which is accurate in 80% of cases tested, showed appellant to be of normal, usual intelligence; there was no evidence of epilepsy. (1 J.A. 168–177.)

Dr. Justin K. Fuller, a psychiatrist, examined appellant for four days in January, 1940, and concluded that he was not at that time insane and had never been insane (1 J.A. 177–79).

Dr. Raymond K. Foxwell, a psychiatrist, examined appellant in April, 1940, and concluded that appellant was not then insane and had never been insane (1 J.A. 191–92).

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Dr. Allen Drummond, a specialist in neurology and psychiatry, examined appellant in January and May, 1940 and found him to be of dull normal intelligence. He found no evidence of epilepsy. Even if appellant were epileptic, Dr. Drummond said, his type would not affect his sanity. Appellant was slightly unstable; however, instability was not unnatural, in view of appellant's execution stays. He found "no evidence that the prisoner committed a crime while suffering from an epileptic state such as a furor, since there was no amnesia, either before or after the episode—the prisoner's consciousness remaining clear at all times." (1 J.A. 179–90.)

Dr. Walter K. Angevine, the D.C. Jail physician, knew of no fits or convulsions of appellant while incarcerated in the period 1936–1940. Appellant had no scars on his tongue. Appellant never complained of epilepsy. (1 J.A. 193–95.)

Three jail guards, *Arthur Howard, Benjamin C. Hayes*, and *Cedric E. Riggs*, testified that they knew of no fits or convulsions of appellant while at the D.C. Jail in the period 1936–1940. *Elmer Graves*, a United States Marshal, testified that appellant's appearance and demeanor in the courtroom during the lunacy inquiry differed greatly from his behavior in the cell block in the Courthouse while awaiting Court sessions (1 J.A. 195–97, 200–01).

Dr. Roger Cohen, who examined appellant at the request of Mr. Sitnick, testified that appellant was, in his opinion, of sound mind in 1937 (1 J.A. 198). Dr. Cohen also testified in 1962, see *infra* p. 11.

C. The views of Drs. Overholser, Gilbert and Perretti in 1949

By letter dated July 7, 1949 Dr. Winfred Overholser, Superintendent of St. Elizabeths Hospital, advised the District Court that appellant "is not now suffering from a psychosis, nor is he of unsound mind, and he is, therefore, no longer in need of care and treatment in a hospital for mental disorders." Dr. Overholser requested appellant's transfer, and on July 21, 1949 certified that appellant "has recovered his reason and * * * is now of sound mind and has been discharged from treatment. * * *" (1 J.A. 205–06.)

Judge Holtzoff, however, refused to accept the certification as conclusive, and ordered a psychiatric examination of appellant and a lunacy inquiry. Drs. Joseph L. Gilbert and Amino Perretti, psychiatrists on the staff of Gallinger Municipal Hospital, reported to the Court that their examinations showed appellant to be of unsound mind, and suffering from undifferentiated psychosis. (1 J.A. 207, 209). Judge Holtzoff directed a verdict of unsound mind on October 6, 1949. (1 J.A. 4, 210). Nineteen months later appellant's sentence was commuted by the President, and shortly thereafter he recovered his sanity and was transferred to the Atlanta Penitentiary (1 J.A. 4).

D. The testimony at the 1962 hearing

Appellant produced the following witnesses:

Dr. Ernest Y. Williams, a psychiatrist, had testified for appellant in 1940. At that time he diagnosed appellant's condition as epilepsia with psychosis. Appellant, he said then, could go as much as two or three years without experiencing an epileptic fit. In 1962 Dr. Williams was still of the view that appellant was an epileptic. His view would not be changed "one iota," he said, by a negative electroencephalogram, or by the knowledge that appellant had not evidenced any signs of epilepsy in 22 years of confinement. Dr. Williams believed that appellant was born with a mental deficiency, and doubted that appellant was able to understand the 1937 proceedings. He also doubted that appellant would have been helpful to his attorney. He thought all convulsions were epileptic in nature; he had never seen appellant in a convulsion. He admitted he was "very inexperienced" in 1940. (1 J.A. 127–46, 201–02; 2 J.A. 11–20.)

Dr. Claude P. Carmichael, a general practitioner, twice examined appellant in 1940, and concluded then that appellant was epileptic and insane. He was not doing, and had not done, work in psychiatry. He could not name one textbook on psychiatry. He believed that temporary insanity and amnesia were concomitants of an epileptic fit. Appellant's ability, he testified, to "distinguished right and wrong is lessened when he is excited." (1 J.A. 101–17.)

Testifying in 1962, Dr. Carmichael opined that appellant was a low-grade moron or imbecile who in 1937 could not understand the nature of the proceedings brought against him or assist his lawyer in his defense. He viewed appellant as an epileptic on the basis of the 1940 lay witness testimony; he had never seen appellant in a convulsion. Neither knowledge of negative electroencephalograms in 1940 and 1947, nor of the absence of any evidence of epileptic fits from 1940 to 1962 would affect his opinion that appellant was an epileptic. Appellant was born an imbecile, he said, and his condition progressively worsened. (2 J.A. 48–53.)

Dr. Frederick P. Watts had testified in 1940, when he was an instructor in psychology at Howard University. Psychological tests given appellant on April 5, 1940 showed, he testified, appellant to have had in 1940 a mental age of six years and one month, and an IQ of 41 (Stanford-Binet scale). When excited, he testified, appellant could not distinguish right from wrong. (1 J.A. 117–27.)

In 1962 Dr. Watts, now a clinical psychologist, testified that appellant was unable to understand the 1937 proceedings, that he could not "intelligently" assist his counsel, though he could consult with him and make suggestions. Appellant, he said, would not have understood the gravity of his trial as would have a "normally intelligent person." He thought that an IQ of 41 in 1940 may have been produced by the pressures of incarceration and the twenty-one stays of execution, but since there were other pressures in 1937, appellant's IQ was probably that low at trial. He believed appellant was suffering from a life-long mental defect, but also said that appellant was not mentally defective. (2 J.A. 53–62.)

Dr. Elmer Klein, a psychiatrist on the staff of St. Elizabeths Hospital in 1940, testified at the lunacy inquiry that he thought appellant feeble-minded and psychotic, but a borderline case, in which it would be difficult "to say that the man is sane or insane" (1 J.A. 164). He found appellant to show no symptoms of epilepsy, and based his doubtful diagnosis of epilepsy on appellant's history as stated by appellant and the lay witnesses. (1 J.A. 157–165.)

In 1962, Dr. Klein (now characterized as an "eminent psychiatrist") testified that he viewed appellant as mentally sick in 1940, but could make no judgment as to appellant's sanity in 1937. He had found appellant feeble-minded, but is sure he was then mistaken, in view of post-1940 intelligence levels, as well as the results of an examination by Dr. Roger Cohen in 1937. Dr. Klein believed appellant's normal IQ to be in the seventies, and testified that appellant was probably functioning in the 77–85 range at the time of his trial in 1937. If appellant were insane in 1940, it could be attributed to the many stays of execution. He testified that an electroencephalogram is accurate in ascertaining the existence of epilepsy in 85% of the cases, and that the very great likelihood was that appellant did not suffer from epilepsy. In any event, epilepsy was not of itself a mental disease. (2 J.A. 62–71.)

Dr. Lawrence L. Bryan administered psychological tests to appellant pursuant to the District Court's order of May 11, 1962. His report showed appellant to have an IQ of 76 (Wechsler A/I scale), to be of inferior intelligence but not mentally deficient, and not to ever have been insane. Appellant was, the report stated, emotionally immature.

Dr. Bryan testified that appellant's IQ of 41 in 1940 was probably due to a "rather significantly serious emotional handicap that he had at the time and did not reflect his true native intelligence." The twenty-one stays of execution appellant received would be, in this regard, a "very important factor." He believed that appellant's IQ at the time of trial was "considerably higher than 41," but admitted that he, Dr. Bryan, could not be of "any great assistance" in determining, on the basis of 1962 observations, appellant's 1937 competency to stand trial. Appellant showed no signs of epilepsy at Atlanta Penitentiary, he testified. Intelligence quotients, he stated, remain fairly constant. (2 J.A. 3–5, 20–39.)

Dr. James E. Greene, a psychologist, examined appellant on June 14, 1962, pursuant to the May 11 order of the District Court. His report states appellant's IQ to be 70 (Stanford-Binet scale), appellant to be of borderline or high grade moron intelligence, and not insane. The report stated that appellant's

1937 psychiatric status was something on which he could not give an intelligent opinion, since the "psychiatric (symptomatic) status of an individual may vary markedly within even a very brief time period * * *" (2 J.A. 5–7).

Dr. Greene's testimony corroborated his report. His tests, he said, showed appellant's mental age to be eleven years and two months. An IQ of 41 in 1940 may have been caused, he testified, by a severe emotional strain suffered by appellant at the time of the 1940 testing. (2 J.A. 90–48.)

The Government produced the following witnesses:

Dr. Margaret Ives, Chief of the Psychology Department at St. Elizabeths, testified appellant was not and had never been a mentally defective person. Hospital records indicated that appellant's IQ (Stanford-Binet scale) was 44 and his mental age was six years and eight months, according to tests administered on July 6, 1940. Appellant's IQ in 1947, which was most probably his normal level, was 85 (Wechsler Bellevue scale) rescored by the witness to 78 under the present day Wechsler A/I Scale)—within the dull normal range. She believed appellant to have been functioning normally at the time of his trial, but probably was psychotic in 1940, probably due to the many stays of his execution. Appellant, she thought, did not display his true mental age in 1940 tests. (2 J.A. 72–79.)

Dr. David J. Owens, Clinical Director of the Maximum Security Unit at St. Elizabeths, received appellant's hospital records. There was no evidence of epilepsy during the period 1940–1949. Specifically, there was a reference in the records to the absence of symptoms of epilepsy. Dr. Owens thought it "highly unlikely" that a person could go eight years without a convulsion if one were in fact an epileptic. Dr. Owens thought that if appellant were not mentally defective today, he was not mentally defective 25 years ago. However, he stated flatly that it was "impossible to determine" a person's mental condition 25 years ago without having then conducted an examination. On the basis of Dr. Roger Cohen's 1937 examination, Dr. Owens believed that appellant was then competent to stand trial. The witness noted that competency is different from

insanity; that one may be mentally ill and still be competent to stand trial, and that competency is a condition that varies from time period to time period. (2 J.A. 79–81.)

Dr. Roger S. Cohen, a psychiatrist, and an original member of the Commission on Mental Health, examined appellant in 1937, and testified at the 1940 lunacy inquiry that appellant was of sound mind at the time of his trial.

Dr. Cohen greatly elaborated on his 1940 testimony in 1962. He described at some length his 1937 testing of appellant. He testified that he found appellant to have been keen and alert when interviewed in 1937, aware of the charges against him, and to have understood the nature of the proceedings. He could rationally consult with his attorney. He displayed no signs of mental deficiency, and, considering his background, behaved normally. Dr. Cohen noted that all convulsions are not traceable to epilepsy, and thought it frivolous to suggest that life-long epilepsy could disappear without any treatment. (2 J.A. 81–95.)

STATUTE INVOLVED

Title 28 U.S.C. § 2255 provides in part:

> *Federal custody; remedies on motion attacking sentence.*
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If

the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

SUMMARY OF ARGUMENT

I

Appellant failed to establish by a preponderance of the evidence that he was incompetent to stand trial in 1937. He produced three witnesses (a psychiatrist, a psychologist, and a general practioner) who, based on brief observation of appellant in 1940, believed, with varying degrees of uncertainty, that he was incompetent at the time of trial, in 1937. The testimony of ten witnesses, some of whom were called by appellant, was that appellant was not of unsound mind in 1937. Moreover, four witnesses, including appellant's experienced trial attorney,

and an eminent psychiatrist who examined appellant three days prior to trial, testified specifically that appellant was competent to stand trial.

II

Appellant received a fair hearing. The District Court conducted appellant's hearing judiciously and according to the forms of law. When appellant took a position during the hearing which was supported by fact and law, his position was accepted by the Court. When appellant was unsound in the law, or factually incorrect, the Court ruled against him. He cannot be heard to complain of such treatment.

The District Court properly denied appellant's motion for a complete psychiatric examination, since the results thereof would not have shed light on appellant's competency to stand trial in 1937. In any event, even if appellant were entitled to such an examination, its denial constituted harmless error; any examination results favorable to him would have been no more than cumulative to the testimony of appellant's witnesses who examined him three, rather than twenty-five, years after his trial.

III

The District Court properly refused to consider or act upon appellant's claims that he was insane at the time of the crime, and that his transfer to Atlanta Penitentiary was improper. This Court remanded appellant's case specifically for a hearing on the issue of competency, having considered and rejected these claims. Such a hearing was held.

ARGUMENT

I. Appellant did not meet his burden of proving, by a preponderance of the evidence, that he was incompetent to stand trial in 1937

A. Appellant had the burden of proving by a preponderance of the evidence that he was incompetent to stand trial

A proceeding instituted under 28 U.S.C. § 2255 is independent of the criminal conviction it examines, and is civil in nature. *Heflin* v. *United States,* 358 U.S. 415 (19–59). The criminal

conviction itself carries with it a presumption of regularity. *Davis* v. *United States*, 226 F. 2d 834 (8th Cir. 1955). Because of this, and because "the proceeding under 28 U.S.C. § 2255 is a civil collateral attack upon the judgment of conviction the burden of proof is upon petitioner to establish by a preponderance of evidence" that he has been deprived of some right under the Constitution. *Miller* v. *United States*, 261 F. 2d 546, 547 (4th Cir. 1958). See also *Hawk* v. *Olsen*, 326 U.S. 271, 279 (1945); *Walker* v. *Johnston*, 312 U.S. 275, 286 (1941); *Johnson* v. *Zerbst*, 304 U.S. 458, 469 (1938); *McNair* v. *United States*, 98 U.S. App. D.C. 359, 235 F. 2d 856 (1956); *McKinney* v. *United States*, 93 U.S. App. D.C. 222, 208 F. 2d 844 (1953); *United States* v. *Jakalsky*, 237 F. 2d 503 (7th Cir. 1956), *cert. denied*, 353 U.S. 939; *United States* v. *Trumblay*, 234 F. 2d 273 (7th Cir. 1956), *cert. denied*, 352 U.S. 931; *Hearn* v. *United States*, 194 F. 2d 647 (7th Cir. 1952), *Cf.*, *Taylor* v. *United States*, 229 F. 2d 826 (8th Cir. 1956), *cert. denied*, 351 U.S. 986.

Appellee can make no sense of appellant's reliance on *Miller* v. *United States*, *supra*, on the one hand (Appellant's Brief, p. 15), and on the other, his contention that once he establishes "a prima facie case [of incompetency] by a preponderance of the evidence," appellee must "establish, beyond a reasonable doubt," competency. (Appellant's Brief, p. i.) For one thing, we do understand how appellant's burden of proof-shifting formula would work. Where the preponderance of evidence lies is ascertained at the conclusion of a case. Nevertheless, appellant would have the court, at that point, when the evidence is closed, place upon appellee a beyond-a-reasonable-doubt burden.[2] Thus, not only does appellant ignore settled case law—even the case law on which he apparently relies—he proposes a wholly unworkable judicial procedure.

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[2] Perhaps, though, appellant is suggesting that the evidence from which a "preponderance" judgment is made is only that evidence produced by appellant in its case-in-chief. If so, the suggestion is frivolous. Appellants "formula" would be no more than a statement, well disguised, that the burden of proof is, always and without qualification, on the Government in Section 2255 hearings to prove the negative of the proposition asserted by the movant.

B. Appellant failed to meet his burden of proof

In twenty-six years, three persons have come forward and said appellant was incompetent to stand trial in 1937. One is a general practitioner, Dr. Carmichael, who, when he examined appellant in 1940, had had no experience or training in psychiatry, and was merely assisting another physician. Dr. Carmichael's adamant refusal to permit his judgment as to appellant's epilepsy to be in any way affected by a twenty-two year nonepileptic period, or two negative electroencephalograms, is significant in evaluating the weight to be given his opinion. The second person to find appellant incompetent in 1937 was Dr. Watts, who was an instructor in psychology when he tested appellant in 1940. Dr. Watts, however, stated that appellant could consult with his counsel, and make suggestions, but could not assist his attorney "intelligently." The third person to find appellant incompetent was Dr. Williams, a psychiatrist. Dr. Williams thought appellant was born with a mental deficiency (a conclusion denied by practically all other evidence in this case). Moreover, he said appellant was an epileptic, and that this view would not be affected "one iota" by scientific proof to the contrary. The witness was not certain that appellant did not understand the 1937 proceedings or could assist his attorney; rather, he "doubted" these propositions.

Other witnesses of appellant offered views as to appellant's sanity in 1937 and 1940. A host of lay witnesses had testified to appellant's fits, convulsions and insanity. Dr. Bruce thought in 1940 that appellant was epileptic. Drs. Carmichael and Williams said appellant was both epileptic and insane. In sum, this was appellant's case.

The Government's case was far stronger. Dr. Klein, a psychiatrist, (called by appellant) thought appellant "probably competent" and not epileptic. Dr. Cohn, a biophysicist, found appellant of sound mind and non-epileptic in 1940. Dr. Fuller, a psychiatrist, found appellant of sound mind in 1937 and 1940. Dr. Foxwell, a psychiatrist, found appellant of sound mind in 1937 and 1940. Dr. Bryan, a psychologist, found appellant of sound mind and normal intelligence in

1962 and 1940. Dr. Greene, a psychologist (called by appellant) found appellant of normal intelligence in 1962. Dr. Ives, a psychologist, found appellant to be of normal intelligence, of sound mind, and competent, in 1937 and 1962. Dr. Owens, a psychiatrist, found, on the basis of Dr. Cohen's examination, appellant competent in 1937.

Were this a complete summary of testimony, appellant would not have met his burden. Consideration of the testimony of two other witnesses, and the reaction of appellant's trial judge to his behavior removes any lingering doubt. Joseph Sitnick, appellant's experienced trial lawyer, found appellant capable of assisting in his own defense. Mr. Sitnick had no doubts about appellant's sanity or competency to stand trial. Out of an abundance of caution, he had appellant examined by a noted psychiatrist, Dr. Roger Cohen. Dr. Cohen found appellant to be of sound mind, and fully competent to undergo trial and assist his attorney. Finally, consideration must be given the role of appellant's trial judge, Judge Proctor. As the District Court noted,

> There is a silent but eloquent circumstance that looms large. * * * The experienced trial judge, who is now deceased, had an opportunity to observe and listen to Bostic for a considerable period of time. It might have been otherwise if Bostic had not taken the witness stand but had remained silent. Manifestly, it is reasonable to assume that Judge Proctor would have noticed any mental inability on Bostic's part to comprehend the nature of the charge, or to participate in his defense. Obviously, if Judge Proctor had any doubt on the matter, he would have suspended the trial in order to subject the defendant to a mental examination.

Competency to stand trial is quite different from and calls for a lesser standard than, capacity to be found guilty. *Winn* v. *United States*, 106 U.S. App. D.C. 133, 270 F. 2d 326 (1959), *cert. denied*, 365 U.S. 848 (1961); *Lyles* v. *United States*, 103 U.S. App. D.C. 22, 254 F. 2d 725 (1957), *cert. denied*, 356 U.S. 961 (1958); *Blunt* v. *United States*, 100 U.S. App. D.C. 266,

244 F. 2d 355 (1957); *Feguer* v. *United States*, 302 F. 2d 214, 236 (8th Cir. 1961). Even if appellant had established that he was of unsound mind in 1937, he would not have met his burden. For "a person suffering from a mental disease of severe proportions may, and often is, found competent to stand trial. * * *" *Bostic* v. *United States, supra*, 112 U.S. App. D.C. at 21, 298 F. 2d at 682 (dissenting opinion of Burger, J.). But in the instant case, appellant failed to establish by a preponderance of the evidence either that he was of unsound mind at the time of his crime or trial, or that he was incompetent to stand trial.

Judge Holtzoff's finding that appellant failed to establish by a preponderance of the evidence his incompetency to stand trial in 1937 is entitled to this Court's respect.

> Human experience in the analysis of the mind has not developed such scientific precision as would require a more rigid standard. Despite sound reluctance of courts "to embark" as Judge Frank put it "on an amateur's voyage on the fog-enshrouded sea of psychiatry," here the very nature of the inquiry itself demands delving into the field of medico-legal art, and the District Court must form conclusions from all the evidence at hand * * * * This was done. There is adequate support in the record here for the District Court's determination of the issue, and we cannot require more.

Johnson v. *United States*, 293 F. 2d 100, 101 (5th Cir. 1961). See also *Hill* v. *United States*, 223 F. 2d 699 (6th Cir. 1955), *cert. denied*, 350 U.S. 867 (the District Court's determination was not "clearly erroneous, and must be accepted as dispositive."); *Lipscomb* v. *United States*, 209 F. 2d 831, 835 (8th Cir. 1954), *cert. denied*, 347 U.S. 962 (District Court's findings on § 2255 hearing of competency to stand trial are "presumptively correct and will not be set aside unless clearly erroneous.") *Cf., United States* v. *Bushwick Mills*, 165 F. 2d 198, 203 (2d Cir. 1947).

II. Appellant was not deprived of a fair hearing

A. The District Court displayed no personal bias against appellant's counsel

Appellant has shopped a 197 page transcript of his three day hearing for "personal bias," and has come up with twelve remarks of Judge Holtzoff, which, he claims, prove his point. Appellant does not dwell on the District Court's observations of counsel's insolence and lack of urbanity (2 J.A. 39, 44), as well as counsel's repeated efforts to argue with the Court. Nor does appellant remark on counsel's repetitious and unfounded objections (2 J.A. 17); his questions seeking to elicit redundancies (2 J.A. 27, 29); counsel's verbosity (2 J.A. 46); counsel's impertinent questions to the Court (2 J.A. 33); counsel's misstatement of a witness' testimony (2 J.A. 35); counsel's unsolicited and erroneous advice to the Court (2 J.A. 39); counsel's misstatement of past proceedings (2 J.A. 70); his practically unlimited, sharp, and sometimes offensive cross-examination of a witness (2 J.A. 88–95).

Throughout the hearing, Judge Holtzoff treated counsel with the respect due a member of the bar. Occasional and justified firmness is not unfairness. Appellant's claim of "personal bias" is unfounded.

B. The District Court's rulings were proper

Appellant next complains of excessive interference and restrictive rulings by the Court. He fails to state wherein the Court's rulings were erroneous; rather, he simply cites this Court to the rulings and, impliedly, argues that because they were unfavorable to him, they were erroneous. Appellee finds only four instances of exclusionary rulings of the Court, as concerns evidence appellant sought to introduce. The Court excluded a question addressed to appellant's mental condition in the future (2 J.A. 27–28); a redundant question concerning intelligence quotient scales (2 J.A. 29); a redundant question addressed to appellant's witness, whom appellant sought to cross-examine (2 J.A. 27); and appellant's attempt to interrogate on redirect examination wholly beyond the scope of cross-examination (2 J.A. 44–45). When appellant had a basis in law for his questions or his objections, he prevailed. (*E.g.*,

2 J.A. 34, 43, 75). It is not the fault of the Court that appellee did not prevail often.[3] See *Coates* v. *United States*, 109 U.S. App. D.C. 200, 285 F. 2d 280 (1960).

The District Court, appellant notes, viewed its task as formidable. Clearly, its task *was* formidable, yet performed fairly and diligently. The Court's misgivings about its task were as honest as its performance thereof was fair.

C. A psychiatric examination was properly denied

Appellant contends that the District Court's denial of his motion for a complete psychiatric examination contributed to the unfairness of his hearing.[4] His motion was properly denied. A 1962 determination of appellant's mental state would not have been of value to the District Court, or to expert witnesses. Doctor Owens of St. Elizabeth's Hospital testified: "I would say it would be impossible for me to determine today what a man's mental condition was 25 years ago, whether he was competent, or in fact, whether he was even mentally ill or not, without having conducted an examination. I think had I conducted an examination at that time, that would be a different matter; but for a determination at this time as to man's competency 25 years ago—* * *" (2 J.A. 80). Since the examination appellant sought would not have been pertinent to the sole issue—appellant's 1937 competency to stand trial—the District Court properly denied it.

In any event, if the Court's denial of the examination was erroneous, the error was harmless. Assuming a 1962 examination, and further assuming a psychiatrist who would have concluded as a result thereof that appellant was incompetent to stand trial in the month of February twenty-five years earlier, the absence of testimony to that effect "does not undermine the conclusion [of competency] reached on the basis of the

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[3] Appellant insists that because the District Court granted his motion for psychological examinations by Drs. Greene and Bryan, and the Government paid the expense of their attendance, the doctors were not his witnesses. Appellee knows of no authority for appellant's view, and notes that appellant offers none.

[4] It should be noted that appellant was in no way prevented from summoning psychiatrists to testify in his behalf.

whole record." *Coates* v. *United States, supra*, 109 U.S. App. D.C. at 201, 285 F.2d at 281. One, such testimony would have been cumulative to that of Drs. Williams, Carmichael and Watts. Two, an opinion based on a 1962 examination to determine 1937 competency obviously would be entitled to very little weight (if indeed, any at all). Three, such an opinion would have had to run the gamut of the views of the several expert witnesses who testified to appellant's competency, or to the difficulty in determining that issue years afterwards. Particularly, the 1962 examination would be of highly questionable value when considered in the light of Dr. Cohen's thorough 1937 examination—conducted in order to determine the very question which is now in issue, and in the light of observations of appellant's trial counsel and trial judge.

III. The District Court properly declined to consider the legality of appellant's transfer from St. Elizabeths Hospital to Atlanta Penitentiary, and the issue of appellant's sanity at the time of his crime

This Court remanded appellant's case "for a hearing on the issue of Bostic's competency to stand trial." *Bostic* v. *United States*, 112 U.S. App. D.C. at 20, 298 F. 2d at 681. The District Court held such a hearing. It did not go beyond the scope of this Court's remand; to have done so would have been improper.

Appellant apparently ignores the last two paragraphs of this Court's opinion. The Court found that appellant offered nothing in the way of new evidence on the issue of his 1937 insanity. That he intended to offer nothing new on the issue in 1962 is clear from the record. Counsel stated:

> Point 2, we are alleging under coram nobis, that the evidence we *are presenting* constitutes new evidence justifying a new trial * * *
>
> [T]he evidence will show that there was no such evidence available to Mr. Sitnick concerning this defendant's mental condition other than the fact that he had Dr. Cohen examine the defendant prior to trial as a precaution. (2 J.A. 8, 9.) (Emphasis supplied.)

The Court, in fact, barred no evidence; rather, it declined to determine appellant's sanity at the time of the crime.

> The COURT. No, I am not going to determine, on a motion, without a jury, whether the defendant was insane at the time of the commission of the crime.

Appellant does not say to this Court, nor did he to the District Court, that he had "new evidence" that was not available to him at the time of his trial or shortly thereafter. His claim on this appeal is thus without merit. See *Bishop* v. *United States*, 96 U.S. App. D.C. 117, 119, 223 F. 2d 582, 584 (1955).

Finally, appellant again challenges his incarceration at Atlanta, urging that he should have been kept in a mental hospital. This Court has heard appellant on this point once before, and on the papers before it could not perceive any basis for relief. The papers remain unchanged. Appellant still attempts to challenge his Atlanta incarceration in a hearing held to determine whether his Constitutional rights were violated in 1937. His sanity was medically determined before his transfer to Atlanta Penitentiary. See *Bostic* v. *United States*, 112 U.S. App. D.C. at 20, 298 F. 2d at 681. Appellant offers nothing but a bare complaint which has been considered and rejected.

CONCLUSION

Wherefore, it is respectfully submitted the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
OSCAR ALTSHULER,
BARRY SIDMAN,
Assistant United States Attorneys.

U.S. GOVERNMENT PRINTING OFFICE: 1963

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JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,439

JAMES BOSTIC,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed March 7, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Division

UNITED STATES OF AMERICA	)	Criminal No. 58,600
	)	
	)	
vs.	)	
	)	
	)	
JAMES BOSTIC	)	
Defendant		

MOTION FOR MENTAL EXAMINATION

The defendant, James Bostic, by his attorney, Edward J. Skeens, respectively moves that the Court direct an appropriate Order in this cause, for the relief prayed for below, and as grounds therefor shows as follows:

1. The United States Court of Appeals in remanding this cause for a hearing by its opinion dated December 7, 1961, stated as follows:

> "At the least, appellant's proffered evidence, including the two findings of lunacy, indicates that he was surely of very low intelligence -- and apparently suffering from a mental defect -- during the period of his trial, and that there may well have been present a mental illness or abnormality of such nature as to make it difficult or impossible for him to assist rationally in his own defense."

2. During argument of the above matter before the Appellate Court, Circuit Judge Washington, the author of the aforesaid opinion, inquired of counsel for the government as to why Bostic was not examined as provided by Title 18 Sec. 4245 of the U.S. Code, especially since the Solicitor General had requested such an examination in the Bishop case. (See brief for appellee in the above cause, case no. 16,405, at pages 16417.)

3. A mental examination of the defendant should be ordered in this cause in order to provide the Court with all possible information that can be made available to it for disposition of the issues raised in this matter.

WHEREFORE the defendant prays that this Court enter an Order providing for a complete mental, psychological, and psychiatric examination and for a report to be filed with this Court answering the following questions.

A. Whether the defendant was suffering from a mental disease or defect prior to and during the period of his trial in 1937 so as to make it difficult or impossible for the defendant to assist rationally in his own defense;

B. Whether the defendant was suffering from an intellectual and emotional defect causing impairment in the defendant's ability to distinguish right from wrong;

C. Whether the defendant was suffering from any mental disease or defect, intellectual or emotional defect, any neurological or psychological defect at the following periods of time: 1. From the time of the defendant's birth until his 21st birthday; 2. At the time that the offense was committed; 3. At the time of his sentence; 4. At the time of his commitment to a mental institution during 1940 and again in 1949; 5. At the time that the defendant was transferred from a mental institution to a penitentiary in the year 1951; and 6. At the present time.

/s/ Edward J. Skeens
Attorney for Defendant

Certificate of Service

I hereby certify that a copy of the foregoing Motion was mailed, postpaid, to Oscar Altshuler, Esq., Assistant United States Attorney, United States Court House, 3rd Floor, 3rd and Constitution Avenue, Washington 1, D.C., this 6th day of March, 1962.

[Filed May 11, 1962]

ORDER

Upon representation of counsel for defendant and counsel for the government that more time is needed for psychological examination of the defendant, it is by the Court this 11 day of May 1962,

ORDERED that the hearing on the motion to vacate be continued until June 21, 1962.

/s/ Alexander Holtzoff
Judge

[Filed June 20, 1962] Cr. 58600

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
UNITED STATES PENITENTIARY
Atlanta, Georgia

June 15, 1962

Assistant United States Attorney Altshuler
United States District Court
Washington, D.C.

Re: Bostic Vs. U.S.A.
Atlanta Penitentiary No. 71274-A

Dear Mr. Altshuler:

Submitted herewith are the results of my examination and study of James Bostic, an inmate of this institution. This study was made in accordance with orders of the U.S. District Court, in Washington, D.C., which orders you transmitted to me by telephone.

Tests administered:

1. United States Public Health Service Classification Test
2. Wechsler Adult Intelligence Scale
3. Rorschach

The United States Public Health Service Classification Test was administered on May 30, 1951; on it the subject earned a non-verbal Intelligence Quotient of 76.

The Wechsler Adult Intelligence Scale was administered on June 11, 1962, and yielded I.Q. scores as follows:

1. Verbal Intelligence 80
2. Performance Intelligence 75
3. Full scale Intelligence 77

The subject gave a total of 16 responses on the Rorschach record. Of these ten were of animals, and five were in the plant category. None were of human beings.

General Remarks

This subject is undoubtedly of inferior intelligence, but cannot be classified as mentally deficient or feeble-minded. Verbal intelligence is in or close to the low-average level. The over-all, or full-scale intelligence score is pulled down by the lower score on performance or non-verbal tests.

While he might be able to function fairly well in a very simple environment, or under close supervision, it is very unlikely that he could make a very good social adjustment in a complicated urban environment in which he would have to make numerous important decisions without assistance from others.

He is regarded as dull, slow-thinking, a slow learner, of inadequate personality, rather complacent, and easy-going. He is rather poorly motivated, and seriously lacking in resourcefulness and originality. Although correctly oriented for time, place, and person, and allegedly free from hallucinations and delusions, he is handicapped by faulty judgment, poor reasoning ability, and very limited insight. He is markedly immature emotionally, and he is dimly aware that he is poorly qualified to make a good inter-personal adjustment with the majority of adults with whom he comes into contact. This study revealed no evidence of the existence of any present or former psychotic (insane) state.

Diagnosis:

1. Without psychosis - (legally competent and responsible)
2. Inferior intelligence
3. Emotionally immature
4. Inadequate personality type.

Respectfully submitted,

/s/ Laurence L. Bryan, Ph.D.
Clinical Psychologist (Adult) USPHS

[Filed June 20, 1962] Cr. 58600

JAMES E. GREENE, PH. D.
Consulting Psychology
130 Hope Avenue
Athens, Georgia
LI. 6-8119

June 15, 1962

U.S. District Court
Attention: Mr. Altshuler
Washington, D.C.

Re: BOSTIC, James
(No. 71274-A)

Dear Mr. Altschuler:

Pursuant to directive on 14 June 1962 I administered certain psychological examinations to James Bostic (No. 71274-A), Atlanta Federal Prison, Atlanta, Georgia. I am sending herewith two copies of my typewritten report, PSYCHOLOGICAL EVALUATION RE BOSTIC, JAMES--NO. 71274-A, which summarizes the results of these examinations.

If the present matter requires further attention from me, please so advise.

Sincerely yours,

/s/ James E. Greene

Enclosures
jg

PSYCHOLOGICAL EVALUATION RE: BOSTIC, JAMES (No. 71274-A)

Identifying data. Subject is a 52 year old Negro male (reportedly born September 22, 1909, Edgewood, S. C.) who received death sentence (Washington, D.C. - March 19, 1937), which was commuted to a 99 year sentence (April 17, 1951 - President H. S. Truman). Subject has a history of hospitalization at St. Elizabeth Hospital, Washington, D.C. and incarceration at the Lexington Federal Prison prior to his transfer to the Atlanta Federal Prison.

Intelligence test results. Subject was administered the Stanford-Binet Intelligence test by the present examiner on June 14, 1962. His attitude and cooperation during the test were satisfactory. On the more difficult tasks he required encouragement to secure his highest level of potential performance. On several test tasks the subject's responses were of borderline quality (i.e., these particular responses were barely "successful," or barely "failure" as measured against the test norms). However, since the number of "barely successful" and "barely failure" responses were about equally frequent, the total Binet findings summarized herein are considered to be reliable and accurate within a rather narrow margin of error. There was considerable "scatter" of responses by age levels. The "basal age" (i.e., year level at which all tests were passed) was established at 8 years. The credits earned at the other year levels were as follows:

Year Levels		Months of Credit
15 - 16		None
13 - 14		8
11 - 12		12
10		8
9		10
8 (and below)		96
	TOTAL	134

The I.Q. (intelligence quotient) obtained from the above-summarized results was 70.

From all the data available for interpretation, it is the present examiner's opinion that the subject is of "borderline" or high grade "moron" intelligence.

Personality evaluation. The personality evaluation of this subject by the present examiner is based on (1) a review of the available documentary data, (2) the use of certain "projective" techniques (e.g., Thematic Apperception Test; House-Tree-Person Test; analysis of dreams, early memories, etc.), and (3) routine interview procedures. As based on the total data thus made available, it is the examiner's opinion that the subject does not at the present time show psychotic symptoms. In some of the "projective" test situations there was evidence of phantasy material of an anti-social character (e.g., drunkeness, dope addiction, burglary, etc.), although most of the responses were well within the range of what might reasonably be expected of an individual having the background of the present subject (i.e., borderline mentality, Negro subculture, history of confinement, etc.). In the writer's opinion the subject displays a reasonably good adjustment to his present environment (Atlanta Federal Prison).

With respect to the captioned item regarding defect ". . . at time of offense and/or trial" (see underlined material on attachment), the present examiner does not have access to data of sufficient quantity and quality to justify the expression of a professional opinion in which he could have full confidence. The official records presently available to the examiner refer to conflicting psychiatric testimony presented by Washington psychiatrists. Since the psychiatric (symptomatic) status of an individual may vary markedly within even a very brief time period, the present examiner cannot find in the presently available data any clear justification for expressing a firm opinion concerning the subject's psychiatric status . . . "at the time of offense and/or trial."

/s/ James E. Greene, Psychologist
Examiner

15 June 1962

[Filed November 19, 1962]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D.C.
June 26, 1962

The above cause came on for hearing of motion before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge, at 2:30 p.m.

APPEARANCES:

On behalf of the Government:

OSCAR ALTSHULER, ESQ.
Assistant United States Attorney

On behalf of the Defendant:

EDWARD J. SKEENS, ESQ.

* * * * *

MR. SKEENS: Your Honor, I'd like to make a brief statement in order to clarify the issues presently before Your Honor.

THE COURT: You may proceed.

MR. SKEENS: First of all, Your Honor, the motion to vacate alleges that the defendant was not mentally competent to assist his counsel or to understand the nature of the proceedings that were instituted against him on February 8 - February 9, 1937.

That issue, of course, does not involve sanity because, as Your Honor has explained previously, being insane is not the test of whether you are mentally competent to understand the proceedings or to assist with counsel.

The second point that the defendant raises is under Title 28, Section 1651, a proceeding in the nature of coram nobis, alleging that the defendand was insane at the time of the crime.

THE COURT: You do not mean insane; you mean mentally incompetent to stand trial.

MR. SKEENS: I have already said that is Point 1, Your Honor.

Point 2, we are alleging that under coram nobis, that the evidence we are presenting constitutes new evidence justifying a new trial; and in this connection we also --

THR COURT: What is your point?

MR. SKEENS: That the defendant was insane at the time of the crime.

THE COURT: At the time of the crime; I won't hear that.

MR. SKEENS: Your Honor is denying that?

THE COURT: Yes, because it is clear that on a motion such as this I cannot determine that issue. That defense was raised or could have been raised at the trial.

MR. SKEENS: If the evidence was avilable to counsel at the time of trial or could have been available; and, Your Honor, the evidence will show that there was no such evidence available to Mr. Sitnick concerning this defendant's mental condition other than the fact that he had Dr. Cohen examine the defendant prior to trial as a precaution.

THE COURT: No, I am not going to determine, on a motion, without a jury, whether the defendant was insane at the time of the commission of the crime. That is a substantive defense and I know of no authority justifying such action.

The Bishop case does hold that on such a motion as this the question of mental competency to stand trial may be raised, and that I shall hear and determine, fantastic as it may be to try to determine the mental state of another human being on a date something like twenty years ago.

What was the date of the trial, Mr. Altschuler?

MR. ALTSCHULER: It was February 8th or 9th of 1937.

THE COURT: Over 25 years ago.

Very well.

MR. SKEENS: The only authority that I have which is similar to the claim we make here is the case of Blocker vs. United States, 1959, 107 U.S. App. D.C. 63. In that case the defendant raised the defense of insanity, unlike this case, and on a direct appeal claimed that there was new medical evidence and that this type of evidence consisted of the change at St. Elizabeths in classifying sociopathic personality and chronic alcoholism together, combined, as a mental disease or defect. The Court of Appeals granted a new trial, with a vigorous dissent by Judge Miller, but it was an en banc hearing and it was an 8-to-1 decision. They said it constituted new medical evidence under Federal Rule 33.

THE COURT: That was a direct appeal.

MR. SKEENS: Yes, but it was more than five days within which you are asked to allow for a new trial.

THE COURT: But it was not 25 years.

MR. SKEENS: No, it wasn't, but I believe they applied the rule in the interest of justice under that rule.

THE COURT: I know of no Act of Congress and no decision of the Supreme Court to the effect that judges may not use their common sense. I am not going to, on a motion such as this, retry the defense of insanity as of the date of the crime. The trial was over 25 years ago and the offense was committed some months before that.

MR. SKEENS: All right. Then that leaves out the second point I intended to raise.

The third point that I intended to raise, and do raise now, is that there was an illegal transfer of the defendant from a mental institution to a Federal penitentiary without the benefit of advising the defendant or according him a hearing on the matter, with representation by counsel, in order to determine whether or not he had been restored to sanity, which would have justified a commitment to a Federal penitentiary.

THE COURT: I am not going to go into that, either. I am going to dismiss that point. That does not come up under a motion such as this.

This hearing will be restricted to the question as to whether the defendant was mentally competent to stand trial at the time that he was tried.

* * * * *

MR. SKEENS: My request is that, rather than have the two Court witnesses from Atlanta come on first, that we put on Dr. Williams, who is presently ill.

THE COURT: I am going to suggest to counsel that counsel may call his witnesses in any order he chooses. That is in the discretion of counsel, entirely in the discretion of counsel.

MR. SKEENS: Yes, sir. And I believe under this section, of course, the defendant carries a heavy burden of proving incompetency and the

burden of proof is on the defendant and, therefore, I plan to call the witnesses as part of the defendant's case.

* * * * *

DR. ERNEST Y. WILLIAMS,

called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

* * * * *

DIRECT EXAMINATION

BY MR. SKEENS:

* * * * *

Q. All right. Now, Dr. Williams, you recall that you examined the defendant, James Bostic, on several occasions during March of 1940; is that correct? A. Yes, sir.

Q. Now, sir, you have also been made aware of the testimony that was submitted to the Court by the nineteen law witnesses and other doctors at a lunacy hearing during 1940; is that right? A. Yes, sir; some of it.

Q. And do you recall testifying at that hearing yourself? A. Yes, sir.

THE COURT: Are you going to base any testimony that you want to elicit from this witness on something that he has heard from other witnesses? Is that what you are going to do? I do not think that is proper because I do not know what he heard from other witnesses.

MR. SKEENS: No, Your Honor; I am merely establishing the background that this witness has in this case.

THE COURT: Well, that is a little different.

MR. SKEENS: I assume that the transcripts of the lunacy -- the transcripts of the two lunacy hearings and the orders of the Court are already part of the record in this Court, so I see no reason to go into that again.

* * * * *

BY MR. SKEENS:

Q. All right, let me ask you this: Can you tell the Court whether you have an opinion as to whether James Bostic was able to consult with

his lawyer during February of 1937? A. Yes, sir.

Q. And what is that opinion? A. I don't think he would be very helpful to his lawyer.

Q. And why is that, sir?

THE COURT: No, that is not what you were asked. There are lots of sane clients who are not helpful to their lawyers.

Suppose you read the question.

(The reporter read the question as follows: "Can you tell the Court whether you have an opinion as to whether James Bostic was able to consult with his lawyer during February of 1937?")

THE WITNESS: Your Honor, my reaction is he was able to talk, but as far as being able to give anything that would be helpful to the lawyer, because of his mental condition, I seriously doubt it. That is what I wanted to say.

THE COURT: Will you read the answer?

(The last answer was read by the reporter.)

THE COURT: Very well. Proceed.

BY MR. SKEENS:

Q. All right. In this same regard, sir, do you have an opinion that you can tell the Court concerning Bostic's mental condition with regard to the nature of the proceedings instituted against him? Was he mentally capable of understanding those proceedings? A. No, sir, I don't believe he was.

Q. Now, can you tell the Court on what grounds you base your professional opinion? A. Our examination at that time showed that Mr. Bostic was suffering from epilepsy, with psychosis, and at the same time, to have shown evidence of mental deficiency.

Q. Yes. Now, sir, your examination was during 1940? A. Yes, sir.

Q. Now, on what basis do you premise that he was substantially of the same condition during 1937? A. Well, for the simple reason the history of epilepsy went very far backwards, ever since he was probably about the age of two or four. I don't recall which one.

21 The second thing was his mental deficiency wasn't something that he put on. That is something you are endowed with by nature. You are either born with or it or you don't have it when you come into this world. And apparently he was born with it, so he just had that at the time of this particular crime.

The psychotic episode seems also to be related to the seizures that he has had for a number of years.

So, putting all three together, the presumption is that he must have been in this state some time before '37.

THE COURT: Well, you say presumption. Of course, we cannot act on presumptions, Doctor.

THE WITNESS: Well, I would say the facts, Your Honor; the facts as we got them.

THE COURT: You know, in the criminal court we deal with people's rights and we cannot act on presumtions or assumptions.

THE WITNESS: Well, I would say the facts, Your Honor, as we got them, if they could be considered facts.

MR. SKEENS: You may examine, Mr. Altshuler.

CROSS EXAMINATION

BY MR. ALTSHULER:

Q. You stated, Doctor, that the defendant was psychotic in 1940 when you examined him? A. Yes, sir.

22 Q. And what was the nature of that psychosis? A. It was undifferentiated. It's very difficult --

Q. Undifferentiated what, Doctor? A. Beg pardon?

Q. Undifferentiated what? A. Undifferentiated psychosis.

Q. And what does that mean? A. An undifferentiated psychosis means it's very hard to say whether it's related to the organic syndrome, as such, or whether it's one of these functional psychoses.

I used the word undifferentiated, meaning we cannot tell whether it can be attached to the organic background or whether it can be attached to a functional background; so we use the term undifferentiated.

Q. Was there any evidence of an organic background? A. The evidence of organic background would be in the shape of the convulsive seizures which he had.

Q. Were any tests made by you or any evidence presented to you showing organic background? A. Well, the organic background would be, sir, the functional psychosis -- I mean the psychotic manifestations that he had.

Q. You mean everyone who has convulsions, epileptic convulsions,
23 has organic deterioration? A. I did not say organic deterioration. I said organic background.

Q. Organic background? A. Yes, sir.

Q. Would there be any test that would show that? A. Some of them, some won't; but it doesn't change the fact that a person has a seizure or he hasn't. Fifty percent of them --

* * * * *

A. I said 50 percent of patients with seizures show evidence by the EEG, but that doesn't mean that the others don't have it.

Q. Did you perform an EEG, Doctor, or have anyone do it for you? A. No, sir; it wasn't in my province to do that.

24 Q. You didn't ask for it to be done or suggest it? A. I don't remember. That was twenty years ago. I can't tell you what I did then.

Q. Do you know that an electroencephalogram was given in 1940? A. Yes, but it wasn't very functional; it wasn't very efficient.

Q. I just asked you if you knew. A. If I knew it was done?

Q. It was given in 1940. A. It was given before that.

Q. Do you know that the defendant was given an electroencephalogram test in 1940? A. No, I didn't know that.

* * * * *

Q. You weren't aware that a Dr. Cohen at St. Elizabeths Hospital performed that test before the lunacy hearing in 1940? A. I have seen it in the record.

Q. Then you were aware of it? A. Yes, I have seen it in the record in the last couple of days.

Q. And do you know that that doctor testified that the results of that test indicated that he was not an epileptic? A. No, that doesn't prove anything, sir.

25 Q. I didn't ask you that, Doctor. I asked you if you knew that he testified that the results of the test indicated that he was not an epileptic? A. No, I don't know that.

Q. Do you know that another electroencephalogram test was given in 1947 at St. Elizabeths Hospital and the results of that test indicated also that he was not an epileptic? A. No, I didn't know that.

Q. Do either of those -- either of that information affect your opinion that he was an epileptic? A. Not one iota, sir.

Q. And do you know also -- by the way, in 1940 didn't you testify that an epileptic would not go more than two or three years, at the most, without an attack? A. I don't remember stating that, but I must have been inexperienced to say that.

Q. In other words, you said you were inexperienced when you made that statement in 1940? A. I must have been if I said they go two or three years without making an attack. I must have been very inexperienced.

Q. Then you say that is incorrect, the way you testified in 1940?

26 A. If I said that he went three years, a person can go that long without an attack, I must have been very inexperienced or else I didn't get the question correctly.

Q. Referring to page 401 of the transcript of the testimony in the 1940 hearing --

* * * * *

Q. -- weren't you asked this question, Doctor:

"Q. Now, isn't it a fact, Doctor, that epileptics will go as long as five, ten, to thirty years without having an attack?

"A. Five?

"Q. Anywhere from five to ten or even as high as thirty years without having an attack.

"A. I can't support your higher figure.

"Q. I am just asking you that. What figure can you support?

"A. Well, they have gone as long as maybe two years, three years, without an attack.

"MR. VILAS: I didn't get that last."

Mr. Vilas was the attorney for the defendant.

"THE WITNESS: I say they have gone as long as two years,
27 three years, without attacks, but as far as five and ten and thirty years, I don't know about that."

Do you recall testifying that way? A. Oh, yes, I remember that. I didn't understand your question at all.

* * * * *

BY MR. ALTSHULER:

Q. Doctor, would you say that a person suffering from epilepsy, grand mal type, could go without having an attack for about twenty years?

A. Yes, sir.

Q. You do say that now? A. Yes, sir.

Q. You didn't say that in 1940, did you? A. I don't remember what I said then.

Q. Didn't I just read back your testimony where you said he could not go longer than two to three years without having an attack? You now change your mind about that testimony? A. I don't get the sense
28 of the testimony that you said. I wish you would read it again.

Q. Didn't you testify as I just read to you from your transcript of your testimony in 1940 that a person suffering from epilepsy would not go more than two or three years without having an attack? Wasn't that your testimony in 1940, as I just read it to you from the transcript?

A. That a person --

MR. SKEENS: Objection, Your Honor. The witness asked him to read the questions and answers again.

THE COURT: You will have to come forward when you want to note an objection.

MR. SKEENS: The Doctor asked Mr. Altshuler to read those questions.

THE COURT: What is your objection?

MR. SKEENS: Objection on the ground that the Doctor does not understand what his testimony was in '40, and asked --

THE COURT: That is not a legal objection. Objection overruled.

MR. SKEENS: He asked --

THE COURT: You may proceed.

BY MR. ALTSHULER:

Q. Do you deny that in 1940 you testified at the lunacy inquisition
29 in regard to James Bostic that a person suffering from epilepsy would not go more than two or three years, at the most, without having an epileptic attack?

MR. SKEENS: Objection. That is not his testimony, Your Honor.

THE COURT: You will have to come forward and not call out objections from the other side of the room. What is the objection?

MR. SKEENS: Mr. Altshuler has not correctly characterized the testimony of this witness.

THE COURT: The Doctor can say so.

MR. ALTSHULER: I asked the Doctor --

THE COURT: I will overrule the objection.

BY MR. ALTSHULER:

Q. Do you understand my question, Doctor? A. No, sir, I don't understand them at all. The way you phrase them I can't get them.

Q. My question is, did you testify in 1940 that a person suffering from epilepsy would not go more than two or three years without having an epileptic attack? A. If I testified that --

Q. Did you so testify in 1940? A. I don't remember, sir.

MR. SKEENS: I object to that, if Your Honor please.
30 He said, "I don't know about that."

THE COURT: You may sit down, Mr. Skeens. I have overruled that objection. Please don't interrupt.

* * * * *

BY MR. ALTSHULER:

Q. And you state now that a person suffering from epilepsy could go without an attack for twenty years or more? A. It is possible, sir.

Q. Is it probable? A. It is probable, too.

Q. And, in other words, then you certainly would say that he would go eight years or more without an attack? A. It's possible too, sir.

Q. And probable? A. Probable too, sir.

Q. The fact that if I were to tell you that from 1940 to 1948, while in St. Elizabeths Hospital, the medical records indicate that the man was observed for possible signs of epilepsy, that no symptoms of epilepsy were indicated and that no treatment was given for epilepsy; and that from 1951 through 1960, part of 1962, while at the Atlanta Penitentiary in Georgia, that the medical records there indicate no treatment or

31 symptoms of epilepsy; would that have any effect upon your opinion that in 1940 and 1937 James Bostic was an epileptic? A. No, sir, it wouldn't.

* * * * *

32 REDIRECT EXAMINATION

BY MR. SKEENS:

Q. Now, Doctor, in response to a question of Mr. Altshuler, you testified that the fact that two encephalograms were taken of the defendant during 1940 and some subsequent year, and he also told you that the results of the encephalograms were normal, and you responded that it would not affect or alter your opinion one iota; sir, would you please explain why this would not affect your opinion? A. Because in our clinic we have seen numerous cases that have had normal encephalograms and we have had them on the wards and seen them in convulsions. So that the fact that they don't have any evidence of an EEG doesn't change our opinion of what we see. We actually see them convulsing, and that is much more a fact, much more so than anything an EEG machine can produce.

Q. Is that as true today, in 1962, as it was in 1940 and subsequent years? A. These machines still record the same way, to my knowledge.

We had a case last week that didn't show any evidence whatsoever by the EEG and, yet, we sent this patient to have an electroencephalogram
33 because of what we saw. The report came back negative.

Q. All right, sir. Now, would an encephalogram disclose in James Bostic in 1940 or 1947 that he was suffering from any mental deficiency? A. The encephalogram cannot --

THE COURT: The Court does not know much about psychiatry, but I think we know that this is not the process or the method for determining mental deficiency.

MR. SKEENS: All right. Thank you.

* * * * *

RECROSS EXAMINATION

BY MR. ALTSHULER:

Q. Doctor, does every person who suffers from convulsions necessarily suffer from epilepsy? A. Well, epilepsy is a very --

Q. Can you answer that yes or no, Doctor, and then explain it afterwards? A. Bring your question again, please.

Q. Does every person who suffers convulsions necessarily suffer from epilepsy? A. Yes.

THE COURT: You mean every kind of a convulsion is epilepsy?
34 THE WITNESS: Epileptic convulsion; that is what you asked me.

BY MR. ALTSHULER:

Q. I didn't say that, Doctor. I said does every person who suffers from convulsions, is he necessarily an epileptic? A. Well, the words are used synonymous.

Q. They are synonymous? A. Yes.

Q. Did you ever see James Bostic in a convulsion? A. No, I have never seen him in one.

* * * * *

MR. SKEENS: Your Honor, as a convenience for the doctors from Atlanta, Georgia I will call now the Court's witness Lawrence L. Bryan.

MR. ALTSHULER: I must object to the defense counsel saying that these are the Court's witnesses.

THE COURT: There are no Court's witnesses.

MR. ALTSHULER: These witnesses were requested to examine the defendant --

THE COURT: Yes; there are no Court's witnesses, Mr. Skeens.

35 The Court did not appoint Court witnesses.

There are occasions when it does, but it did not do so here.

MR. SKEENS: Well, the defendant -- they are here on the defendant's motion.

THE COURT: All I did was to direct that -- Suppose we swear the witness first. We do not want to have the witness standing around.

Thereupon,

LAWRENCE LEONARD BRYAN,

called on behalf of the Defendant, having been duly sworn, was examined and testified as follows:

THE COURT: The Court wishes to state that it suggested or directed that the defendant be examined by two psychologists to determine whether he is suffering from a mental deficiency. The Court did that because it assumes that a mental deficiency is a permanent, static condition, unlike insanity or other forms of mental disease.

The Court did not designate the psychologists as Court's witnesses.

MR. SKEENS: Well, what I meant, Your Honor --

THE COURT: I do not want them referred to as Court witnesses any more.

That is all right; you may proceed.

36 MR. SKEENS: That they are not --

THE COURT: They are your witnesses because you are calling them.

DIRECT EXAMINATION

BY MR. SKEENS:

* * * * *

Q. And what is your address? A. 207 East Lake Terrace Southeast, Atlanta 17, Georgia.

Q. And what is your age and occupation, sir? A. 61.

THE COURT: I do not think you have to ask a witness his age, Mr. Skeens. You can ask him his occupation. I would not ask such personal questions as that.

THE WITNESS: My occupation is clinical psychologist.

BY MR. SKEENS:

Q. Now, sir, how long have you been a clinical psychologist?

37 A. I have been employed in that capacity since March 2, 1925.

* * * * *

THE COURT: What is your connection? You said you have been employed in that capacity. Are you connected with any institution?

THE WITNESS: Yes, sir; at the Atlanta Penitentiary since August 1, 1946.

THE COURT: Well, I think the Doctor is sufficiently qualified as a clinical psychologist. I am quite sure that the Bureau of Prisons would not have him for all these years if he was not qualified.

MR. SKEENS: Yes, I will agree with Your Honor on that.

BY MR. SKEENS:

Q. Now, sir, did you have an occasion, pursuant to the Court's order, to examine one James Bostic? A. Yes, I did.

Q. Now, sir, do you remember approximately when that was? A. About ten days ago.

* * * * *

38 Q. All right, sir. Now, which test did you administer during these two occasions when you examined James Bostic? A. First, I gave a Wechsler Adult Intelligence Scale, and, second, the Rorschach Test.

* * * * *

39 Q. You also performed the United States Public Health Service classification test; is that true? A. Yes.

Q. Now, what does that consist of? A. That is a non-verbal intelligence scale. It's a pencil and paper test. There is no reading and writing involved in it. It includes, oh, such things as ability to see how various forms should be put together --

THE COURT: Doctor, did you arrive at an intelligence quotient for this man?

THE WITNESS: Yes, sir.

THE COURT: What was his intelligence quotient?

THE WITNESS: It was 77.

THE COURT: You may proceed.

I might ask you this: 77 is classified as a person in what mental group?

40 THE WITNESS: I would say inferior in intelligence, but definitely not mentally retarded.

THE COURT: Does that mean a high grade moron, would you say, or is it better than a high grade moron?

THE WITNESS: Well, that's hard to answer, Your Honor, because some people -- some psychologists and psychiatrists restrict the term "moron" to the upper level of feeblemindedness or mental deficiency and others to the lowest level of normality.

I would certainly say, myself, that he was in the lower level of normality.

THE COURT: You may proceed.

* * * * *

BY MR. SKEENS:

41 Q. Well, sir, as a result of these examinations, is there any way that you can tell the Court what his mental age is now, what the age classification of his intelligence is at the time you examined him?

A. My best figure on that is twelve years and four months.

Q. All right, sir.

THE COURT: What would be normal?

THE WITNESS: About sixteen years, Your Honor; and mentally deficient would be below ten years.

BY MR. SKEENS:

Q. Now, what were you findings as to his maturity, sir?

A. His maturity? That goes into the realm of emotions, and my estimate there is based upon emotions rather than intelligence, and I felt that he was emotionally rather immature.

* * * * *

42 Q. Now, sir, would you tell the Court how the defendant Bostic appeared to you during these examinations, concerning his judgment and reasoning ability? A. He impressed me as being rather impaired, rather inferior in judgment and reasoning ability.

Q. What about his personality type, Doctor? Did you come to any

43 conclusions as to that? A. Well, I thought that he was rather inadequate, that his personality was consistent with his IQ and mental age.

Q. All right. Now, Doctor, in your capacity in your employment as a psychologist at the Federal institution at Atlanta you have had certain records made available to you concerning James Bostic, is that correct, and you have studied them and used them in conjunction with your examination; is that right?

Now, sir, can you tell the Court, on the basis of your examination in June of 1962, whether James Bostic's mentality or his mental efficiency or deficiency, was it at a higher level before you examined him or was it at a lower level? A. Well, how far back would you go?

Q. As far back as the day he was born. A. Well, I don't know what it was like years before I saw him, but, in general, I feel that a person's intelligence is a fairly constant thing, barring some very serious illness or accident or other very unusual circumstance.

Q. All right, sir. Now, can you tell the Court whether or not his intelligence will improve to any degree at all beyond the present time as to what it is now? A. I see no reason to anticipate any

marked improvement in his intelligence at any time in the future.

44 I think that various tests by various persons, given under different conditions, would show some variations in IQ and mental age, but I don't think there would be any great deviations either way, not great enough to show either thoroughly normal intelligence or great enough to show mental deficiency or mental incompetence, as based upon intelligence.

Q. Well, sir, there is no doubt in your mind at the present time James Bostic is a mental deviate; isn't that correct?

THE COURT: Is what?

MR. SKEENS: Mental deviate.

THE COURT: I do not know what you mean by mental deviate. He did not use the word "deviate" in his testimony.

BY MR. SKEENS:

Q. Do you know what I mean by mental deviate, sir? A. No, I have no way of reading your mind and figuring out what your understanding of that term is.

Q. What is your understanding of that term, sir?

THE COURT: No, no; this is your witness. You asked him a leading question.

MR. SKEENS: I will withdraw that.

* * * * *

47 Washington, D. C.
June 27, 1962

* * * * *

48 LAWRENCE LEONARD BRYAN

* * * * *

DIRECT EXAMINATION --(Continued)

BY MR. SKEENS:

Q. Now, sir, do you recall or do you have any knowledge as to what type of work, if any, the defendant Bostic has been doing in Atlanta since he was incarcerated there in 1951?

THE COURT: How is that relevant? We are trying to investigate the defendant's mental capacity as of the date of his trial. What he has

49 been doing in Atlanta since would not be very helpful, would it?

MR. SKEENS: Well, this is the position, Your Honor: There is evidence in the 1940 hearing that Bostic was feebleminded, with an IQ of 41 and a basal age of six years, one month. Now, we have testimony here there has been some improvement, and I would like to develop that to show --

THE COURT: There is no testimony that there has been any improvement. The testimony is that his IQ is 77 and that his mental age is twelve years, four months, not that there has been improvement.

MR. SKEENS: There is a difference --

THE COURT: -- and in answer to a question propounded by the Court, the witness stated that those figures remain pretty constant. So there is no evidence of any improvement.

MR. SKEENS: Well, I will ask the witness, then.

BY MR. SKEENS:

Q. Sir, are you aware of the fact, from your investigation of this case, that there were two psychologic tests made of the defendant, one in 1940 and one in 1947? A. Yes, I am aware that there were two different tests of his intelligence administered in those years.

Q. Being aware of them, were you aware of the results of those

50 two tests? A. I am aware of the 1941 results. I don't clearly recall the 1947 scores.

Q. Do you recall the 1940 scores, sir, on Bostic's psychological examination? A. I believe it was an IQ of 41, with a mental age of around six years.

Q. All right, sir. Now, bearing that finding in mind, which is part of the record in this case, can you tell the Court whether or not the 22 years lapse of time since your examination would represent any difference in the mental condition of the defendant Bostic? A. Anybody can experience a marked change in mental condition in much less than 22 years time.

THE COURT: Well, to me, the answer is a little ambiguous.

I would like to put it this way: You say that in 1941 the test showed a mental age of six years, and how many months?

THE WITNESS: I don't recall in terms of mental age, Your Honor. The IQ, I believe, reported was about 41.

THE COURT: Well, now, in your opinion does the difference between the results of your test and the 1941 test indicate that there has been a change during that period, or does it indicate merely

51 that two different psychologists arrived at the same result from the same material -- different results from the same material?

THE WITNESS: I should say different results upon the same person, but the material could very probably have been somewhat different; that is, the individual could have been functioning differently at one time from the way in which he functioned when the other test was given.

THE COURT: Well, I am still not clear.

In your opinion, does this difference between the two tests indicate any change in the man's mental condition, or does it merely indicate that two different tests at two different times reached different results as to the same mental condition? That is what I want to know.

THE WITNESS: I think it is very likely that the lower score obtained in 1941 -- and I believe that is the lowest that has ever been obtained on him -- was probably due to a rather significantly serious emotional handicap that he had at that time and did not reflect his true native intelligence.

THE COURT: Was that during the period of his insanity and confinement in St. Elizabeths Hospital? Because at one time he was confined as insane in St. Elizabeths Hospital.

52 MR. SKEENS: This test, Your Honor, has been erroneously referred to as 1941. It was March of 1940. The tests were conducted while the defendant was awaiting a hearing on the lunacy inquisition, which occurred --

THE COURT: Where was he?

MR. SKEENS: He was at the District Jail.

THE COURT: But the tests were conducted immediately prior to the time that he was committed to St. Elizabeths Hospital?

MR. SKEENS: Yes, sir.

THE COURT: Well, would insanity, Doctor, affect a person's IQ or mental age?

THE WITNESS: Most kinds of insanity would, yes, Your Honor.

THE COURT: I see. You may proceed.

* * * * *

53 THE COURT: May I ask you this, Doctor: Does an IQ of 41 indicate feeblemindedness, or is it higher than feeblemindedness?

THE WITNESS: No, sir; that would definitely indicate feebleminded-ness, Your Honor.

THE COURT: Now, which grade of feeblemindedness? Is it a moron or feebleminded? There are several grades there. Which grade is it?

THE WITNESS: It would be very close to imbecility, Your Honor.

* * * * *

54 BY MR. SKEENS:

Q. In this regard, Doctor, I will quote you some intelligence quotient figures and ask you if you agree with the authorities, that is, Hutt and Gilby, that an idiot having an intelligence quotient would be below 20.

THE COURT: Just what is your question?

MR. SKEENS: I ask him if he agrees with these figures on class-ifications of an idiot, imbecile, and a moron.

THE COURT: He is your witness, you know. Do not cross-examine him.

MR. SKEENS: I merely want to find out, Your Honor.

THE COURT: Then do not ask leading questions.

BY MR. SKEENS:

Q. Can you give us, sir, the accepted standards by the American Association on Mental Deficiency as to what intelligence quotients --

THE COURT: He has already answered that an IQ of 41 is close to imbecility. Now, isn't that enough? What else do you want to find out along that line?

MR. SKEENS: Well, I was interested to find out whether in fact it is imbecility.

THE COURT: He said close to imbecility. He is your witness and you cannot cross-examine him.

MR. SKEENS: Of course, I object to that ruling, Your Honor. I don't feel that he is the defendant's witness.

55 THE COURT: Objection overruled.

BY MR. SKEENS:

Q. Sir, as I asked you previously, do you have any knowledge as to any activity or industry that Bostic has been performing at Atlanta since his commitment there in 1951? A. Well, when he first went there he worked in the hospital as an orderly for about eight months; and since then, with no particular interruption, he has worked in our industries.

Q. And how much time has he spent in work in industries, sir? A. Well, during all of the time that he has been in the Atlanta penitentiary, with the exception of about the first eight months.

Q. And do you know the type of work he was doing there in industry? A. It's something in the textile mill. I don't know the exact type. There are many different types of work in the textile mill.

Q. All right, sir. Now, considering this background and the fact of confinement of the defendant Bostic, would that have any bearing on his intelligence quotient from the period 1951 to the present time? A. No, I don't think so.

Q. So then it is your professional opinion, then, that his intelli-

56 gence quotient was about the same in '51 as it is today? A. Probably so.

Q. And can you give the Court any opinion on what, assuming that the conditions continue, on whether defendant Bostic's mental condition will either improve or deteriorate any more in the future?

THE COURT: I am going to exclude that. I have to determine his mental capacity as of 1937, not as of some time in the future.

Of course, it is almost an impossible task, but that is the task that the Court of Appeals has delegated to me.

MR. SKEENS: Well, I believe the testimony would show from these--

THE COURT: No; proceed, please. The Court does not invite responses to its comments.

MR. SKEENS: Well, as part of my objection to your Honor's ruling -

THE COURT: You may ask the next question.

MR. SKEENS: May I make a proffer?

THE COURT: No, you may not. Ask the next question.

* * * * *

57 BY MR. SKEENS:

* * * * *

Q. All right, sir. In what classification would you consider a mental defective on the Wechsler test? A. Somebody with probably -- probably someone with an IQ of below 70.

58 Q. And what about 70 to 79? A. Inferior.

Q. Is that above or below a borderline normal -- moron?

A. To me, that would -- it would definitely --

THE COURT: Just a moment, Doctor. We had all that yesterday. He testified that 77 was inferior intelligence but not mentally deficient, that it was in the lower level of normality and it corresponded to the mental age of twelve years, four months. You have gotten that from this witness. Let's move along.

MR. SKEENS: Well, I asked him what classification that he follows under the Wechsler Scale between 70 and 79, since he has testified it is a 77. I would like to know from this doctor --

THE COURT: He testified that 77 indicated inferior intelligence but not mentally deficient, that it was in the lower level of normality. Now, that was his testimony, so let's not repeat it.

BY MR. SKEENS:

Q. All right, sir. So, then, I ask you is this classification above or below a borderline moron under the Wechsler Scale? A. Well,

59 there is a disagreement, as I pointed out yesterday, between psychologists on that point. Some say that the moron level is the lowest level of normality, and others say that it's the highest level of mental deficiency.

So, it's just a matter of, really, of individual preference.

Q. So, then, you do not classify it in either category; is that correct? A. That's right; I let those argue about it who want to argue about it. I just call it inferior intelligence and let it go at that.

Q. All right, sir. Turning now to the specific issues in this hearing, as a result of your investigation --

THE COURT: I thought we were on the specific issue all the time.

MR. SKEENS: I believe I was in background and history, Your Honor.

THE COURT: I am not going to let you spend so much time on background. I suggest you stick to the specific issue from now on until the end of this hearing and do not get away from it.

MR. SKEENS: Of course, I would object to that ruling, Your Honor.

BY MR. SKEENS:

60 Q. Can you, sir, give an opinion to the Court as to whether the defendant Bostic possessed the mental capacity to understand the nature of the first degree murder proceedings instituted against him during February of 1937? A. It would be pretty much an opinion in the realm of speculation because I didn't see him or examine him myself at anywhere near that time.

Q. So, are you saying, then, Doctor, that you cannot be of any assistance to the Court concerning Bostic's mental competency during 1937? A. I am saying that I cannot be of any great assistance to the Court in that regard.

MR. SKEENS: You may examine.

CROSS EXAMINATION

BY MR. ALTSHULER:

Q. Doctor, I'd like you to assume certain facts and then I will go back and ask you some questions based upon these assumed facts:

That the defendant was tried on a charge of first degree murder in 1937, in February, and was found guilty and sentenced to death;

That during the next three years he had 21 stays of execution of the sentence of death;

That at the end of the last three years he was found to be, judicially

61 determined to be psychotic, of unsound mind, and committed to a mental institution;

That at that point, or just prior to that adjudication, within a few months prior to that, he was given a psychological testing, in which his IQ was shown to be 41;

That three months later, after his commitment to the hospital, St. Elizabeths Hospital, another psychological testing showed an IQ of 44;

Subsequently, in 1947, an IQ testing was given again, showing a rating of 85.

And then, of course, you are familiar with the testing that you gave in 1962, showing an IQ of 77.

Now, I ask you, Doctor --

MR. SKEENS: I object, Your Honor.

THE COURT: Just a moment. You may not interrupt a question.

Proceed, Mr. Altshuler.

BY MR. ALTSHULER:

Q. Do you have any explanation, Doctor, based on these assumed facts, which would account for the rating of 41 in 1940, as compared to your rating of 77 in 1962?

MR. SKEENS: Objection, Your Honor; it is because Mr. Altshuler has now quoted certain items and certain tests which have never been produced in evidence in this court.

62 THE COURT: Objection overruled. This is cross-examination, and on cross-examination it is proper for counsel to propound his own hypothesis.

You may answer, Doctor.

THE WITNESS: It is my best opinion that the IQ obtained in 1940 of 41 is lower than any other IQ which you have told me about just now because of a functional handicap which was present in the individual when he was tested in 1940.

BY MR. ALTSHULER:

Q. You referred to a functional handicap in 1940. What is that handicap? A. It could be either simple severe emotional stress or it could be insanity or, as we call it, a psychosis, or it could be both.

Q. Is the fact that there were 21 stays of execution of the death penalty from the time of 1937, the trial, until the time he was tested in 1940, could that have an effect also upon his mental condition and the low rating of the IQ in 1940?

MR. SKEENS: Objection to that, Your Honor.

THE COURT: Objection overruled.

THE WITNESS: Yes, I would certainly say that that could be a very important factor contributing a good deal to the possible emotional stress which I mentioned a while ago.

63 BY MR. ALTSHULER:

Q. Would you say that the IQ rating which I asked you to assume of a testing in 1947 at the hospital was an accurate rating of his intelligence at that time?

MR. SKEENS: I object, Your Honor. He doesn't know anything about that.

THE COURT: Mr. Skeens, I suggest, or may I remind you that this is not a jury trial. The rules of evidence are not strictly applied in such a hearing as this, so you do not add anything either to your client or to assist the Court by popping up with objections all the time. If this were a jury trial the Court would strictly enforce the rules of

evidence, but we do not do that in hearings of this kind, and, generally, defendants benefit by our not enforcing the strict rules of evidence, because if I did enforce the strict rules of evidence a great deal of material that you elicited from Dr. Bryan I would have to strike out.

You may proceed, please.

MR. SKEENS: Well, then, with this ruling that Your Honor has made --

THE COURT: You may resume your seat, sir.

MR. SKEENS: I would like to know, sir --

THE COURT: You may resume your seat, sir.

MR. SKEENS: -- if I am precluded from making objections.

64 THE COURT: You may resume your seat. You have made your objection and it is overruled. Now you may resume your seat, or else the Marshal will show you your seat.

BY MR. ALTSHULER:

Q. Had you finished your answer to the last question, Doctor?

A. Yes, sir.

Q. By the way, Doctor, did you have occasion to read a transcript of the defendant's testimony at the time of his trial in 1937? A. Yes, I did.

Q. Now, is there anything in the assumed facts that I have given to you, plus the information that you have in this case, which permits you to form an opinion as to whether the defendant's IQ in 1937, at the time of the trial, was around 41 or 44, as indicated in 1940, or 85 or 77, as indicated in the subsequent tests?

THE COURT: Do you mean on the basis of his reading of the testimony given at the trial, Mr. Altshuler? Is that what you mean?

MR. ALTSHULER: No; I was asking him to consider that also; not solely his testimony at the trial, but the testimony at the trial and the subsequent tests that were given in 1940, '47, and '62.

65 MR. SKEENS: Objection, Your Honor.

THE COURT: Objection overruled.

* * * * *

THE WITNESS: My best judgment is that the IQ at the time of trial was considerably higher than 41, but I cannot be too sure about myself in that matter because I didn't do the testing, I didn't see the man at those times.

BY MR. ALTSHULER:

Q. In your preparation for your examinations of the defendant, Doctor, did you have occasion to read the medical records of James Bostic as they pertained to his years at the penitentiary in Atlanta, that is, from about 1951 until the present time? A. Yes; in fact, I have found an annual review here for 1957, in my possession at this moment.

Q. Doctor, is there any indication in the approximately eleven, twelve years while at Atlanta, Georgia that the defendant suffered from convulsions or was treated for epilepsy? A. No, there is no indication whatsoever of that.

Q. At the present time, Doctor, assuming James Bostic were to go to trial today for this particular charge of first degree murder,
66 and assuming the facts to be true as you read in his testimony at the time of trial, would Bostic be able today, with his present IQ rating, be able to understand the nature of the charge pending against him?

MR. SKEENS: Objection.

THE COURT: Objection sustained. I do not think that would be relevant.

I want to say to both of you gentlemen that I am going to give a very full hearing. I am going to give both of you an opportunity to offer all relevant testimony. But I am going to confine it to the issue that I have to decide, if I can decide it; namely, mental capacity to stand trial as of February, 1937.

It is a fantastic task, but I have to do the best I can with the evidence at my command.

Of course, the moving party, the defendant, has the burden of proof, and Judge Prettyman in the Bishop case said it is a very heavy burden.

* * * * *

REDIRECT EXAMINATION

BY MR. SKEENS:

Q. Now, sir, with regard to your answer that you found nothing
67 in the records indicating that the defendant Bostic suffered any convulsions or seizures during his incarceration at Atlanta, sir, is there any reason or explanation for such absence in the record to the change in his environment prior to commitment in the criminal case and subsequent commitment? A. I know of no difference in the environmental factors that held in this case that would account for either the presence or the absence of seizures or convulsions, either before or after he came to the Atlanta penitentiary.

* * * * *

69 THE WITNESS: Well, I have found an IQ on the man, when I tested him under what I thought were very favorable conditions for getting a very accurate appraisal of his intelligence, I found an IQ of 77; and I do not feel that the IQ of a person ordinarily changes very much one way or the other throughout his life.

BY MR. SKEENS:

Q. Can you tell the Court whether or not Bostic has been mentally deficient, as you have now found, for his entire life?

MR. ALTSHULER: I object to the mental deficiency. I think the Doctor said he was not.

THE COURT: Objection sustained. You must not do that, Mr. Skeens. You misstated his testimony. The witness' testimony is that
70 Bostic is not mentally deficient, he has inferior intelligence, but not mentally deficient.

You have now stated just the opposite. I do not like that, Mr. Skeens.

MR. SKEENS: All right; I will withdraw that, Your Honor.

* * * * *

BY MR. SKEENS:

Q. As a result of your investigations and the testimony you

have given here today, can you tell the Court whether or not Mr. Bostic had ever been mentally deficient? A. No, I cannot say definitely that he has ever been mentally deficient at any time in his life.

Q. Yet you have stated to the Court that during 1937, without the benefit of any psychological test, his intelligence quotient was more than 41; is that correct? A. Not quite. I said I would have to make a conjecture, I would have to make a very rough estimate as to his intelligence in 1937.

An opinion that I would give about his intelligence at that time would not be of very high value.

Q. So, then, isn't it true to say, Doctor, that you don't know whether his intelligence quotient during the time of trial was 41 or 44, or 35 or 75; do you? A. I have already said that several times in this
71 testimony that I have given on this case, yesterday and today.

However, I can state quite confidently that, from my reading of the transcript of his trial and of his confession, that the wording that he used and his utterances as they were quoted in those two documents were certainly well above those that I would expect to find in a person with an IQ as low as 41.

Q. So, then, are you telling the Court, sir, that you are able to read a transcript of a man's statement and able to apply your experience to it and then tell what the man's intelligence quotient would be, within certain limits? A. Within certain limits, yes.

Q. Now, don't you have to take into account, other than that, you would have to take into account the personal history of the subject? A. No, no, not too much.

Q. Then you say it wouldn't make any difference to you if you found, from personal history, that there were nineteen persons, lay individuals, who testified that the man was suffering from epileptic seizures from birth till his --

THE COURT: I am going to strike out any reference to other people's testimony.

BY MR. SKEENS:

72 Q. All right, sir. Assume that there has been testimony given

that Bostic has been suffering from convulsions and epileptic seizures from the time he was two years old until he became an adult. Would that make any difference in your appraisal of reading Mr. Bostic's testimony at his trial, to determine his IQ? A. No, I don't see why that should. I have even known of some college professors who are true epileptics.

* * * * *

Q. And would the fact that Bostic had -- there is evidence, assuming these facts, that Bostic had an education of less than the third reader; would that factor be a consideration in your determining his intelligence quotient from his testimony in 1937? A. I would think that since that is all the education that he had at that time, that he did mighty well to answer questions as well as he did when he was making his confession and at the time of trial.

Q. Sir, you refer to confession. Is this a signed statement you
73 have seen or James Bostic signing a signed statement before a police officer? A. I understand that it is.

THE COURT: I suggest, Doctor, that perhaps it would be better if you confined your opinion to the transcript of the oral testimony given by the defendant at his trial, without referring to his signed confession, because a signed confession might be paraphrased and the exact phraseology might be that of the person who actually typed the statement from the oral confession.

Would your answers be any different if you confined them solely to the transcript of the oral testimony given by the defendant at the trial and not including the confession?

THE WITNESS: No, Your Honor.

MR. SKEENS: I wonder if the reporter might read Your Honor's statement in which I heard the answer "no"?

THE COURT: No; proceed with the next question.

BY MR. SKEENS:

Q. Well, is it your testimony, sir, that you cannot make an evaluation of the rationality of Bostic's testimony without using the confession?

THE COURT: No, that is not what I said. I asked him if his testimony would be any different if he omitted the confession and based it solely on the oral testimony given at the trial.

74 Well, now, are you ready to call the next witness, Mr. Skeens?

MR. SKEENS: No, Your Honor; I intend to go into Bostic's testimony with this witness.

THE COURT: You intend to do what?

MR. SKEENS: I want to show him a question and answer in Bostic's testimony during his trial and ask him if he considers that a rational answer.

THE COURT: Just one question and answer?

MR. SKEENS: No; there are about ten or twelve.

THE COURT: Beg pardon?

MR. SKEENS: Ten or twelve.

THE COURT: No, I am not going to permit that. He is your witness and you may not cross-examine him.

MR. SKEENS: This came out on cross-examination by Mr. Altshuler, Your Honor. I didn't ask him anything about Bostic's testimony.

THE COURT: Well, I am going to read the testimony, of course, and I shall determine whether an answer is rational, because that is not a matter for a psychiatrist or a psychologist.

MR. SKEENS: And I agree with that. I don't think this witness should have been asked that at all.

THE COURT: I will eliminate that line of inquiry.

MR. SKEENS: All right; my objection is noted, Your Honor.

75 THE COURT: Thank you, Doctor. You may step down.

(Witness excused.)

THE COURT: Call your next witness.

Frankly, gentlemen, I am going to say to you that I shall consider my reading of the testimony one of the most important items in this hearing, and, of course, that is part of the record of this case.

MR. SKEENS: I think that is contrary to the decision in the appeal in this case, Your Honor.

THE COURT: Beg pardon?

MR. SKEENS: That is contrary to the decision of the United States Court of Appeals in this case.

THE COURT: The Court is not inviting argument or answers to its comments.

Call your next witness.

You are getting insolent, Mr. Skeens.

MR. SKEENS: I am objecting to that, Your Honor, that consideration.

* * * * *

75 JAMES E. GREENE, SR.

76 called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

THE COURT: You may proceed, Mr. Skeens.

DIRECT EXAMINATION

BY MR. SKEENS:

* * * * *

77 Q. Sir, pursuant to a Court order of this Court, have you had an opportunity to examine psychologically the defendant Bostic at the Atlanta penitentiary during June of this year? A. Yes, I did.

* * * * *

78 Q. Now, is there any reason why you used the 1916 in preference to the 1937 Revision of that test? A. Well, I, as many other psychologists, I have some personal preferences, and this happens to be one that I have found to be extremely useful; and in this instance the presumed virtues of the other test were not applicable because the presumed range of intelligence of this client --

79 THE COURT: Doctor, what intelligence quotient did you find?

THE WITNESS: 70, sir.

THE COURT: And what does that indicate, what stage of mental development?

THE WITNESS: Well, different psychologists attach different nomenclatures to findings, but I think it's fairly generally agreed that this is somewhat near the lower limit of normality. Most psychologists refer to this as borderline, or at least a great many of them refer to it as borderline.

BY MR. SKEENS:

Q. Is that borderline moron, sir? A. Well, again, this would be a matter of which authority you were reading. Some authorities use from an IQ of 50 to 70 as moron, and others 50 through 79.

THE COURT: Well, we are interested in your opinion. You are the witness.

THE WITNESS: Well, I would classify this client as falling within the lower ranges of normality, based on my findings.

THE COURT: In other words, you would consider him above a moron?

THE WITNESS: Perhaps so; yes.

THE COURT: Without any perhaps; would you or wouldn't you?

80 THE WITNESS: Well, yes.

THE COURT: You may proceed.

* * * * *

MR. ALTSHULER: I think the reports of both psychologists made of James Bostic last month in Atlanta should be admitted in evidence.

THE COURT: Suppose we do one at a time.

Then Dr. Greene's report will be considered as an exhibit in evidence.

81 What about Dr. Bryan's report?

MR. ALTSHULER: Mr. Skeens objects to one phrase, I understand, in Dr. Bryan's report, where he says that Bostic at the present time is legally competent and responsible. I have no objection to that being stricken.

THE COURT: Well, suppose that sentence be not considered in evidence, because, after all, it is not pertinent to the issue.

* * * * *

83 BY MR. SKEENS:

Q. Doctor, can you form a professional opinion as a result of your investigation and other information that's been provided to you, as to whether the defendant Bostic was mentally capable of understanding the first degree murder proceedings instituted against him during February of 1937?

THE WITNESS: Your Honor, may I qualify?

THE COURT: You may answer in your own way.

THE WITNESS: I did not examine this witness -- I mean this
84 person, in 1937 and I therefore would have to depend on second-hand reports and various other --

THE COURT: I understand, Doctor, but suppose you answer the question. Do you have an opinion or not?

THE WITNESS: I do not have an opinion in which I would place very much confidence, sir.

THE COURT: Well, are you able to express an opinion?

THE WITNESS: I would prefer not to --

THE COURT: Very well.

THE WITNESS: -- to express an opinion on it because I think it would be relatively worthless.

* * * * *

CROSS EXAMINATION

BY MR. ALTSHULER:

Q. Doctor, according to your testing last month, what would be the mental age of James Bostic? A. In the eleven-year range, eleven-two was the precise figure I got.

* * * * *

85 THE COURT: And what is the normal mental age?

THE WITNESS: We usually think of sixteen, sir, as being the normal. Some authorities say fifteen.

BY MR. ALTSHULER:

Q. And is there a figure for mental deficiency? A. Well, there are several such figures, but as I stated earlier, it is commonly held that mental deficiency most authorities would say below seventy, with an IQ below seventy. Some place it still lower.

MR. SKEENS: Your Honor, I object to the testimony that it's eleven years and two months, when the witness has stated in his report it's eight years.

THE COURT: Well, that is no reason for striking the testimony. You can argue that.

BY MR. ALTSHULER:

Q. Doctor, would you clarify what you meant by eight years?

A. Yes, I will be happy to. The age level at which all tests were passed successfully according to the norms was at age eight.

Q. Is that called the mental age? A. No, this is not called the mental age at all. This is called basal age and it is simply an age used in calculating mental age and IQ.

86 Q. Then the basal age is eight years? A. That's right.

Q. And the mental age is eleven years, two months? A. This is correct, sir, according to my finding.

* * * * *

88 Q. Doctor, you have already stated that you are unable to express or unwilling to express a definite opinion as to the defendant's actual IQ at the time of trial in 1937.

However, you did, I understand, have occasion to read the defendant's oral testimony at the time of trial; is that correct? A. Yes, I did so read it.

Q. Now, is there any indication in that oral testimony, from a psychological point of view, the vocabulary and the content, which in your opinion would indicate whether the IQ in 1937, at the time of trial, was higher or lower than the IQ of 41 indicated in 1940?

MR. SKEENS: Objection.

THE COURT: Objection sustained. You know, reading testimony is a matter for a layman. I can read it and determine whether it reads intelligently or stupidly. I do not think that is a question for expert opinion.

* * * * *

89 REDIRECT EXAMINATION

BY MR. SKEENS:

* * * * *

Q. Now, as I asked you previously -- and you did not answer -- a lot on this test, the Simon Binet test, depends upon the cooperativeness of the subject? A. This is correct.

Q. Did you find that the defendant Bostic was cooperative in giving you answers in this test that you conducted? A. I would say as much so as I would anticipate under the circumstances; and I have tested a good many persons under somewhat similar circumstances.

90 Q. Well, isn't it a fact that you had to assist him in his answers before you -- A. No --

THE COURT: Just a moment. This is not proper redirect examination because this does not relate to anything in the cross-examination.

MR. SKEENS: Your Honor, we have come up with a different opinion here today.

THE COURT: I don't know what you mean by "come up."

MR. SKEENS: The witness has testified differently from what has been admitted in evidence in this report, and I would like to question him about it.

THE COURT: You may question him concerning matters in regard to which he was cross-examined. You may do that on redirect. But the present question does not relate to anything concerning which he was cross-examined on.

And may I suggest to you, sir, that you use a more urbane tone in addressing the Court.

MR. SKEENS: I am sorry, Your Honor, if I have not been using a proper tone of voice. It seems respectful --

THE COURT: It is not the proper tone, but your manner has not been very urbane.

MR. SKEENS: Well, I don't understand that, Your Honor. I mean,

91 I apologize if I have --

THE COURT: Very well, your apology is accepted.

MR. SKEENS: -- if I have made any expression of some kind.

THE COURT: We expect all members of the bar to be gentlemen.

MR. SKEENS: Well, I certainly respect Your Honor, as Your Honor knows. I have worked for Your Honor twleve years ago and I have never lost any respect since then.

THE COURT: I know, but I just suggest that your manner might not be quite as blunt as it has been. Very well. I am sure it was not intentional.

MR. SKEENS: Well, I am sorry, Your Honor.

THE COURT: Very well.

BY MR. SKEENS:

Q. Sir, in your report you said that he required encouragement to secure the highest level of potential performance. What kind of encourage did you give Bostic? A. Well, verbal encouragement, obviously. Just simply whenever he made a response on questions for which I could commend him, I did commend him. And this does tend to have an encouraging effect on subsequent responses which a person being tested will make.

There was no financial inducement or anything of this sort,

92 obviously. This is standard procedure.

THE COURT: Mr. Skeens, you are going outside of the cross-examination.

BY MR. SKEENS:

Q. So, in arriving, now, in your testimony today, at a mental age of eleven years and two months, isn't it a fact, then, that you had to assist him in these answers?

THE COURT: I am going to exclude that as not proper redirect examination because it is outside of the scope of the cross-examination.

MR. SKEENS: I object to that, respectfully, Your Honor. The question refers to the eleven years, two months which he has testified to in Mr. Altshuler's question.

THE COURT: I am going to exclude that.

* * * * *

93 BY MR. SKEENS:

Q. Now, sir, can you give any account to the Court in the difference in the intelligence quotient, why it would be 85 in 1947 and then down as low as 70 in 1962? A. I attempted to state earlier that variations in reported mental age and reported IQ might be due to one or a combination of one or more -- or a combination of the following factors: an actual bona fide change in the intelligence of the individual, or the skill of the examiner who gave the test, or the measuring instrument employed;and I would not be able to say which of these three had the major influence. but these variations are not, in my opinion, to be considered highly unusual.

Q. All right, sir. So, then, of course, you realized that he was not under any strain of the death penalty in -- there were no stays of executions in 1947, which the defendant was anticipating electrocution,

94 which could have had any effect between the 85 and 70 in the periods 1947 and '62; is that correct? A. Yes.

* * * * *

Q. All right, sir. Now, did you take into account, sir, that having been advised that there was a verdict in 1940 of insanity, with psychosis, and the defendant was committed to St. Elizabeths Hospital, would the fact that the defendant may have been suffering from psychosis, with epilepsy, when the tests were taken in 1940 have any bearing on the IQ of 41? A. I have previously testified I believe that severe state of

95 mental upset --

THE COURT: Let's not repeat what you said before. You are asking the witness to repeat his prior testimony. Let's move along, Mr. Skeens.

BY MR. SKEENS:

Q. Assuming that in 1940, when the psychological test was performed, in March of 1940, that the defendant was suffering from a psychosis associated with epilepsy, would that have any bearing on the 41 IQ test results performed in 1940? A. Yes, I --

THE COURT: Just answer yes or no.

THE WITNESS: Yes; O.K.

BY MR. SKEENS:

Q. Now, sir, can you give the Court your professional opinion as to the defendant's mental capacity or his age through his entire life, on the basis of what you have learned in this case? A. I wouldn't feel competent to do this with any --

THE COURT: Very well, you have answered the question.

THE WITNESS: -- with any degree of assurance.

BY MR. SKEENS:

Q. So, then,you do not know whether his intelligence quotient at the time of trial was 41 or 50 or 30 or 70, do you? A. No, I don't.

96 THE COURT: Just a moment. I am going to exclude all that. That goes beyond the scope of the cross-examination and it is not proper redirect, besides which it is only repetitious of what has already been brought out. This witness practically said that he can't tell a person's mental age or IQ as of any other time except as of the time that he examined him, --

THE WITNESS: That's right.

THE COURT: -- which seems logical to me.

BY MR. SKEENS:

Q. Now, sir, how did you arrive at a mental age of eleven years and two months as a result of your examination in 1962, June?

A. I administered the test, established a basal age which carried with it a credit of 96 months, and I gave the test at these remaining age levels and I got a total of 134 months, which I divided by 12, and it gave me an answer of eleven years and two months.

Q. Now, sir, would the fact that you had to encourage him in his answers make any difference in the total months of credit, the 134 which you used to divide, in getting this mental age of eleven years and two

97 months?

* * * * *

THE WITNESS: Not appreciably. May I add to this?

THE COURT: No; just answer yes or no.

THE WITNESS: Yes; O.K.

THE COURT: You said not appreciably?

THE WITNESS: That's right.

BY MR. SKEENS:

Q. Well, can you tell us more specifically, in the total months of credit, what effect that would have, your encouragement? A. Well, I am not sure it would have any at all.

* * * * *

98 CLAUDE P. CARMICHAEL

called on behalf of the Defendant, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

102 BY MR. SKEENS:

* * * * *

Q. Doctor, what kind of work have you been doing for the past 22 years? A. Well, I have been practicing neuropsychiatry in connection with Dr. Williams at Howard University and Freedmen's Hospital.

Q. Is that the same neuropsychiatrist Dr. Williams that testified earlier in this case yesterday? A. The same, sir.

Q. How many years have you been associated with him?

A. Since 1940.

Q. During that time did you have occasion to develop an expertness and knowledge in the field of psychiatry? A. Well, I have done the best I could.

Q. All right. Now, during that time did you have occasion to perform psychiatric examinations?

THE COURT: I will take his testimony for what it is worth, Mr. Skeens. I will let you examine him as though he were an expert.

MR. SKEENS: All right.

* * * * *

104 BY MR. SKEENS:

Q. What is your opinion, sir? A. Now you got me a little confused.

THE COURT: Suppose you read the question again.

(The reporter read the question as follows:

"And, sir, with regard to the examination you conducted and the history you have obtained in this case, can you at this time express an opinion to the Court as to the mental competency of James Bostic, the defendant, as to whether he understood the nature of first degree murder proceedings instituted against him in February of 1937?")

THE COURT: Now, what is your opinion?

THE WITNESS: My answer is I don't think that he could.

BY MR. SKEENS:

Q. All right. Now, with regard to defendant Bostic's mental competency to assist his lawyer in his defense during the proceedings held in February of 1937, can you express an opinion to the Court whether

105 Bostic was mentally competent to do that? A. I don't think that he was.

Q. Now, sir, your opinions are based upon what evidence? Would you please tell the Court why?

THE COURT: Well, he has given his opinion. Why don't you let that be tested by cross-examination? You may ask what --

MR. SKEENS: It's just my last question, Your Honor.

THE COURT: Very well.

BY MR. SKEENS:

Q. On what grounds, sir, do you have this opinion? A. Well, based on examinations that we conducted and the history and observation of the patient, Bostic, at the time that we examined him.

Q. And what did you find, sir? A. Well, I thought that Bostic was what we call a low-grade moron or an imbecile.

THE COURT: Speak up, Doctor, so we can understand you.

THE WITNESS: I thought that Bostic was a low-grade moron or an imbecile.

THE COURT: Now, what is it, imbecile or a moron?

THE WITNESS: Well, imbecile I characterize a person between
106 a moron and an idiot, midway between.

I thought he was an imbecile from birth and that he suffered from epileptic seizures, which further weakened his mentality; and I thought that due to both of those things, that he was incapable of rendering much help to his lawyers at the time of his trial.

* * * * *

CROSS EXAMINATION

BY MR. ALTSHULER:

Q. You said you examined Bostic in 1940. That was the first time you had ever seen him? A. The first time I ever saw him.

Q. And it was based on that examination and his past history that you came to the conclusion that he was an epileptic who was psychotic; is that true? A. I examined him twice.

Q. Twice in 1940? A. About an hour and a half each time, in company with Dr. Bruce one time and Dr. Williams on another time.

Q. And it was based on that examination and the history of Bostic that you concluded that he was psychotic and epileptic? That's the sole basis for your conclusion? A. That is true.

Q. And in 1940 you had just started to do psychiatric work; is
107 that correct? A. Well, at this time I hadn't. I started afterwards.

Q. I am sorry? A. At the time of this first examination I hadn't started to do psychiatric work. It was after that that I started.

Q. You started after this examination to do psychiatric work?
A. (Nods head.)

Q. Now, this history of Bostic was secured from what source; from Bostic himself? A. From Bostic himself and reading the affidavits of persons who testified in the case that had known him from birth.

* * * * *

108 Washington, D.C.
June 28, 1962

* * * * *

109 CROSS EXAMINATION (continued)

BY MR. ALTSHULER:

Q. Doctor, in your opinion, if a man has -- are convulsions caused by anything but epilepsy? Are there any other causes for convulsions except epilepsy? A. Yes, sir.

Q. And would some of those causes be a result of fever in regard to measles, whooping cough, pneumonia or any severe recurring illness? A. That's true.

Q. And also in the cases of hysteria, severe emotional upset? A. That's true.

Q. In other words, you state in your opinion that if a person has convulsions he does not necessarily have epilepsy? A. Well, I would say that.

* * * * *

110 Q. Did you ever see James Bostic have a convulsion or a fit? A. I never saw him have a fit.

Q. How long would you say a person who suffers from epilepsy could go without having an attack, a convulsion?

* * * * *

A. I think one could go a long time without having a convulsion.

Q. And how long is a long time, in your opinion, Doctor? A. Well, time is a relative thing. It may be --

Q. One year, Doctor? A. Many years, maybe.

Q. Two years? A. Maybe longer than that.

Q. Three years? A. Maybe twenty.

* * * * *

111 Q. Do you know of any case, Doctor, where a person has actually gone as long as twenty years without having a convulsion and he was a known epileptic? A. Well, I couldn't say that I did, but I have heard of people having a convulsive seizure, after having had them once, a long time afterwards.

Q. Do you know of any case that you read of where a person who was a known epileptic did not have a convulsion for at least twenty years? A. I think I do. I think so.

Q. You do know of a case? A. I think so. I can't positively say, but I know that --

Q. Is it usual for a person to go twenty years without an epileptic fit? A. Well, that is probably not usual.

Q. Is it usual for him to go eight years without having an epileptic fit? A. Well, I wouldn't want to be pinned down to say that it would be usual.

Q. The sole basis for your determination that James Bostic was
112 an epileptic in 1940, Doctor, as I understand it, was based on the affidavits of six lay witnesses who testified, or, rather, who stated in their affidavits that they had seen what appeared to be convulsions in James Bostic's early childhood and in his teen ages; is that correct? A. The diagnosis was based largely on history, all history that we could get, and affidavits were part of the medical history.

Q. Was there any medical history or information that you had from any source whatsoever stating that James Bostic was an epileptic? A. My diagnosis was made largely from the history.

Q. If I told you, Doctor, to assume that an electroencephalogram test was given to James Bostic in 1940, around the time you examined him, and that another electroencephalogram test was given in 1947, and that neither of these tests indicated evidence of epilepsy, would that have any effect upon your opinion of epilepsy? A. Well, it would not.

Q. If I told you to assume that from the period of 1940 to 1948, while James Bostic was in St. Elizabeths Hospital, that the hospital specifically observed him with regard to whether or not he had epilepsy and that the hospital records indicated neither symptoms of epilepsy nor treatment for it, would that have any effect upon your opinion? A. That
113 wouldn't change it.

Q. If I told you that subsequently from 1951 through some time early in 1962 that the prison records at Atlanta, Georgia indicated neither symptoms nor treatment for epilepsy, would that have any effect upon your opinion? A. That wouldn't change it.

REDIRECT EXAMINATION

BY MR. SKEENS:

Q. Now, Dr. Carmichael, do you have to see a person in an act of convulsion in order to diagnose the case as being one of epilepsy? A. That would be very helpful, if you could see one convulsing. It would be very helpful.

Q. Now, Doctor, are there different types of convulsions that a person can suffer? A. Well, yes, sir.

Q. Now, sir, recalling the testimony and affidavits of some of the witnesses in this case, where they characterize Bostic as having frothed at the mouth and laying on the ground in a rigid position and the body shaking and having to stick a pencil in his mouth while in school to keep
114 him from swallowing his tongue; now, can you describe what type of convulsion that would be? A. Well, it appears to be the type that they call grand mal epilepsy.

Q. And what do you mean by grand mal?

THE COURT: We know that. There is no jury here. The Court knows what grand mal epilepsy is.

MR. SKEENS: All right. That is all I have, Your Honor.

* * * * *

FREDERICK P. WATTS

called on behalf of the Defendant, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SKEENS:

Q. Would you please state your full name and address?

115 A. Frederick P. Watts; 1433 Taylor Street, Northwest.

THE COURT: What is your last name?

THE WITNESS: Watts; W-a-t-t-s.

BY MR. SKEENS:

Q. And is that in Washington, D.C. A. Washington, D.C.

Q. All right, sir. What is your profession? A. I am a clinical psychologist.

Q. And how long have you been so engaged?

THE COURT: You are a psychologist, did you say?

THE WITNESS: Psychologist.

BY MR. SKEENS:

Q. And how long have you been so engaged? A. Approximately thirty years.

THE COURT: What is your present connection?

THE WITNESS: I am director of the counselling service, the University Counselling Service at Howard University.

BY MR. SKEENS:

Q. Now, sir, do you have any special, specific titles in the field of psychiatry? A. I do not.

Q. Well, specifically, I mean do you have any other than ordinary qualifications in --

116 THE COURT: The witness said he is a psychologist, not a psychiatrist.

MR. SKEENS: Yes.

BY MR. SKEENS:

Q. Well, can you tell us what your present status is with the Board of Psychology, the National Board? A. I am a diplomate of the American Board of Examiners in Professional Psychology.

THE COURT: Very well. You will concede his qualifications as a psychologist?

MR. ALTSHULER: Yes, Your Honor.

BY MR. SKEENS:

Q. All right. Now, Doctor, you have had occasion to examine the defendant Bostic during March of 1940; is that correct? A. I think it was April of 1940.

Q. Yes, sir. And you have also testified at a lunacy inquisition held by this Court during the year 1940, concerning this case? A. I did, sir.

Q. And do you recall your testimony then, at that time? You have had an opportunity -- A. I have had an opportunity to reread my testimony.

Q. And you were also here in Court when you heard the two
117 psychologists from Atlanta testify?

THE COURT: No, I am not going to have one witness base any conclusions on testimony of other witnesses.

I did not apply the rule on witnesses in this case, but it does not follow that one witness should be influenced by testimony of another witness.

MR. SKEENS: No, I didn't mean to infer that by that question.

THE COURT: Then I will exclude the question.

BY MR. SKEENS:

Q. All right, sir. Can you briefly, for the Court, explain the nature of your examination, what type of test it was and where you conducted it and who was present?

THE COURT: May I make an inquiry, Mr. Skeens?

Is it Dr. Watts?

THE WITNESS: Yes, Your Honor.

THE COURT: Is Dr. Watts' testimony transcribed and part of this record? I mean his 1940 testimony?

MR. SKEENS: Yes, Your Honor.

THE COURT: Well, it is not necessary to repeat it. I will have it before me.

BY MR. SKEENS:

Q. Can you tell us again, then, what was your conclusion as a result of your examination? A. My conclusion was that, according to
118 test results, the individual had an IQ of 41, mental age of six years and one month.

Q. All right, sir. Now, on the basis of what you have learned in this case and your examinations at that time,can you now --

THE COURT: No; on the basis of what he learned in this case, I am going to strike that out because we don't know what he learned in this case.

MR. SKEENS: I will rephrase that, Your Honor.

BY MR. SKEENS:

Q. From the history that you have obtained relating to James Bostic and your examinations, are you able to form a professional opinion as to the defendant's mental competency to understand the nature of first degree murder proceedings instituted against him in February of 1937? A. I am able to form an opinion.

Q. Now, what is that opinion? A. I don't believe he was able to understand the nature of the murder proceedings against him in 1937.

Q. Now, with regard to defendant Bostic's mental competency to advise and assist with his attorney during and before his trial in the year 1937, the month of February and the preceding months, can you express an opinion as to his mental competency in that regard?

119 A. I do not believe that he was mentally competent to adequately assist his attorney in 1937.

THE COURT: Well, do not use the medical term "mental competency" because that is a conclusion.

Was he able to consult intelligently with his attorney, answer questions and advise his attorney?

THE WITNESS: I do not believe he was able to consult intelligently with his attorney, Your Honor.

BY MR. SKEENS:

Q. Now, Doctor, could you please tell the Court on what grounds you base these opinions? A. May I ask something with regard to information I may use?

THE COURT: No; just answer the question, Doctor.

Read the question, please.

(The last question was read by the reporter.)

THE WITNESS: When I examined Bostic his IQ was 41, and 41 is at a defective level of functioning.

Now, it may be, at this particular time, that I did not obtain Bostic's normal level of functioning because he was under a great deal of pressure.

There seems to be evidence that Bostic functions at a defective level under pressure; and if an individual is functioning at a defective

120 level, I do not believe he is able to give adequate assistance in a trial.

THE COURT: Well, suppose at the time of the trial he is not functioning under pressure or on a defective level; would he be able to assist counsel?

THE WITNESS: If Bostic were not functioning under pressure, I still believe that he could not function as a normally intelligent individual would function. I believe that he is a dull person, even when not under pressure.

THE COURT: Well, now, of course, there are many dull persons who make a living and who sometimes get into court, are there not?

THE WITNESS: Yes, sir.

THE COURT: And the fact that a person is dull does not mean that he cannot consult with his lawyer, does it?

THE WITNESS: It does not mean that he cannot consult with his lawyer, but I thought Your Honor asked me if he could intelligently consult with his lawyer.

THE COURT: Well, when I say intelligently I mean as a normal human being, even if he is dull, because, after all, I did not mean to intimate that a dull person should not be tried.

THE WITNESS: No, sir. Dullness, however, sir, is not a normal level of functioning.

121 THE COURT: Suppose you strike out the word "intelligently." In your opinion, was he able to consult with his counsel, answer counsel's questions and make any suggestions to him?

THE WITNESS: Yes, sir, he was articulate, he was able to do that.

THE COURT: You may proceed.

BY MR. SKEENS:

Q. All right, sir. Now, what, if anything, in the way of the time of his trial could you give your opinion on that would be such a pressure as to affect his normal reactions mentally? A. Yes, sir, I believe that he

was under pressure at the trial. I believe anyone on trial for murder would be under pressure.

Q. Now, sir, would that pressure be any different than the type of pressure at the time he was awaiting execution and there were 19 stays? A. No, I can't tell you, sir, whether or not it would be any different. I think both were pressure. I can't tell you whether or not there would be any difference in pressure. They both are, I would say, fairly severe degrees of pressure.

Q. All right. Now, do you believe that Bostic had a sufficient mentality to understand the gravity of a first degree murder proceeding
122 against him?

THE COURT: Not what he believes; a witness may be asked his opinion, but not his beliefs.

BY MR. SKEENS:

Q. Do you have an opinion on that, sir? A. I do not believe that he would understand the gravity as a normally intelligent person would understand the gravity.

THE COURT: Well, as a dull person?

THE WITNESS: As some adult persons would understand the gravity.

BY MR. SKEENS:

Q. Now, sir, if I would tell you that there has been some testimony in this case at this time that the defendant, James Bostic, has a mental age somewhere between eleven years and two months, and twelve years and a few months, that is, on tests conducted during June of 1962; and if I were to tell you that there were tests conducted at St. Elizabeths a few months after --

THE COURT: Do not use that form because that is not correct. You may ask the same question in hypothetical form. You may ask him to assume the following facts.

BY MR. SKEENS:

Q. All right, sir. Assuming what I have just told you, and assuming
123 that a psychological test was performed on the defendant Bostic

during the year 1940, a Binet test, and it resulted in an intelligence quotient of 44; and a Wechsler test was conducted -- assuming these facts -- at St. Elizabeths in 1947, which resulted in an intelligence quotient of 85; and the intelligence quotients derived from the examinations during 1962 were 77, approximately, and on a Stanford-Binet test it was an intelligence quotient of 70; now, sir, can you tell the Court whether or not, assuming these facts, the defendant has been suffering from a permanent mental defect all of his life? A. I believe, sir, that the person has been suffering from a mental defect probably all of his life.

* * * * *

124 THE COURT: May I interrupt you?

MR. SKEENS: Yes, sir.

THE COURT: Doctor, I would like to ask you a question as an experienced psychologist of many years' standing. I have heard testimony concerning different IQs for this man, some of them years apart but some of them, like between 70 and 85, within a reasonable period. I am wondering how much faith I should give to the intelligence quotient when it depends upon the particular test used and the particular psychologist who applies it.

In other words, how reliable are these numbers measuring what is known as an IQ, for short?

125 THE WITNESS: There are degrees of reliability of the IQ. The IQ changes under certain conditions. The intelligence is not an isolated characteristic of the individual, but it is influenced by other characteristics, and an IQ is simply a measure of the level of the behavior of an individual at a particular time. It is a sampling of his behavior at a particular time.

THE COURT: What I had in mind was this: If different psychologists reach different results, different numbers, and also in applying different tests different numbers are reached, how much faith and reliance can we place on these numbers?

I have been troubled by that in other cases in recent months because I have had other cases where two or three psychologists, measuring a

person's IQ two or three months apart -- not a difference in years -- would arrive at diversely different figures, and that has been kind of shaking my faith in what I used to think was an exact science.

THE WITNESS: No, sir; it certainly is not, sir. I think you are justified, certainly justified with regard to your doubts about the IQ.

Even when the same psychologist, using the same tests, examines an individual at a later date, he may get a different IQ. So, we have what is known as a standard error of measurement which we make use
126 of. So we do not place too much confidence, either, upon a particular IQ. We simply say that the chances are that this individual's IQ falls within a certain range and we speak of levels of confidence with regard to that.

THE COURT: Then is there an exact measure of level of intelligence?

THE WITNESS: No, sir; it's always within a range.

Now, we give certain examinations to students at the University, but we speak of bands. We simply say that an individual's performance falls within a particular range.

No, sir, we don't have too much confidence in these points because, you see what would happen, a person -- let us say that 69 is mentally defective and 70 is borderline. All right. Well, now, within maybe five or six days' time you are going to find the individual going from borderline to mental defective. So we don't place too much confidence in those points.

THE COURT: Your answer has been very helpful.

* * * * *

CROSS EXAMINATION

BY MR. ALTSHULER:

Q. What is your opinion, Doctor, about a person who has been
127 given a Wechsler-Bellevue testing and has achieved a rating of 85? Would you classify him as a mental defective?

* * * * *

A. I would consider him a dull individual.

Q. I didn't ask you that, Doctor. A. I would not.

Q. You would not consider him mentally defective? A. I would not.

Q. Thank you. Now, if he were given a Wechsler test and achieved a rating of 77, would you consider that person mentally defective? A. I would not.

Q. If he were given a Stanford-Binet test and achieved a rating of 70, would you consider him mentally defective? A. I would.

Q. You would? A. Yes, sir; 1916 revision, I would.

Q. Now, you stated that you didn't believe that the 41 rating that you secured from the patient in 1940 was his normal level of intelligence? A. Yes, sir.

128 Q. Do you believe that his normal level was higher or lower than the 41? A. I believe it was higher than the 41.

Q. And the basis for saying that -- what was your basis for saying that in 1937, three years previously, that his level of intelligence was about the same as it was in 1940, that is, around 41? A. I don't believe I said that, sir. I believe I said that he was functioning at that level.

Q. All right. Then, what is the basis to believe that three years previous to your examination he was functioning at an IQ level of 41, in 1937? A. Because, sir, it seems that there is some consistency in the behavior of this individual. It seems that under pressure he functions at a defective level; and he was under pressure, certainly, in 1937, when he was being tried for murder.

Q. Do you think he was under more or less pressure in 1937 than he was in 1940? A. Well, I don't know. I have no way of measuring degrees of pressure.

Q. Do you have any evidence to know whether he actually was under any severe pressure in 1937? A. I have no evidence, but I believe that he was under pressure, under a great deal of pressure of trial.

129 Q. That would be your guess? A. That would be my guess; yes, sir.

Q. And if your guess were wrong, then the IQ would not be down along that level? A. That's right.

* * * * *

ELMER KLEIN

called on behalf of the defendant, having been duly sworn, was examined
130 and testified as follows:

DIRECT EXAMINATION

* * * * *

BY MR. SKEENS:

Q. All right. Now, Doctor, directing your attention to the defendant, James Bostic, -- he is not in the courtroom, sir, if you are looking for him -- directing your attention, do you recall testifying in a lunacy inquisition during the year 1940, in this Court, concerning his sanity at that time? A. I recall it by having refreshed my memory about my testimony.

Q. Now, Doctor --

THE COURT: Well, his testimony is part of the record, is it not, Mr. Skeens?

MR. SKEENS: Yes, Your Honor.

THE COURT: It is before the Court.

MR. SKEENS: Yes, so I will not ask him to repeat any of that
131 again.

BY MR. SKEENS:

Q. Now, Doctor, you, of course, are aware of the nature of this proceeding; isn't that correct? I have told you about this proceeding? A. Yes, in that sense I am; yes.

Q. And what we are concerned with here today was the question of Bostic's mental ability to understand these proceedings, the first degree murder proceedings in 1937 and his ability to consult with and assist his attorney before and during that trial in 1937. A. Yes, sir.

Q. Now, sir, on the basis of the history and your examinations conducted in 1940, can you give the Court your opinion concerning those two items? A. Only a very tentative opinion. At the time that I examined him I felt that he was psychotic, mentally sick. But whether or not he was mentally sick at the time that he committed the crime, I am not prepared to say.

Q. I am not referring, sir, to the time of the crime in 1936. I am referring to the time that he was on trial in February of 1937. A. Well, or at that time. That was three years later that I examined him.

132 Q. Yes. And I recall that your conclusion then was that he was psychotic, suffering with feeblemindedness; is that correct? A. Yes.

Q. Now, sir, can you tell the Court on the basis of your history and examinations, how long this feebleness had persisted in this defendant Bostic? A. Well, in reviewing the case, I must say that I must have been mistaken about the feebleminded aspect of the thing because subsequently it developed that he was not feebleminded. And if he had been feebleminded at the time, he certainly wouldn't have come up in his intelligence level.

So that at the time that I examined him I found that he was suffering from a psychosis; and I gave him a psychological examination, which must have been grossly impaired, the results of it must have been grossly impaired by the fact that he was mentally ill at the time that I examined him, which I mistakenly, apparently, took to be a state of feeblemindedness.

If he had been feebleminded, you see, with a mental age of about six or seven, as I found him to be at the time that I examined him, he certainly wouldn't have had the higher intelligence level which he was subsequently shown to have.

Q. Now, what intelligence have you learned that he was shown to have later? A. I understand that he -- well, I happened to be over-

133 hearing the previous testimony that he had an intelligence quotient of 77, or 70, or something of that sort.

And I have discussed it with another physician, I might say, as well, who had examined him in 1937, and for whose opinion I have a high regard, and he recognized at that time that he was not feebleminded.

Q. So, then, sir, you feel, then, that you can't tell the Court too much about his mental condition in 1937? A. Not too much, except I must simply repeat what I said, that I must have been mistaken in my diagnosis of 1940 as to his intelligence level, which was low, to be sure, but that low level of intelligence can and is frequently due to the mental illness from which that person is suffering at the time; and that I must have mistakenly referred or attributed it to feeblemindedness, which he apparently did not have.

Q. All right, sir. Now, what evidence did you find at that time that he was suffering from a psychosis? A. Well, he was --

THE COURT: Well, I do not believe it is necessary to go into that. There is an adjudication in 1941 that he was psychotic, so you do not have to prove that.

MR. SKEENS: All right, sir.

134 THE COURT: The Court is going to assume that in 1941, some four years after his trial, he became insane while he was in prison, in the death cell, awaiting execution, had been awaiting execution for over three years.

I suppose it is not surprising that a person who is under a sentence of death for three years and whose execution is postponed from time to time might become insane.

THE WITNESS: That is true. Many of them do.

* * * * *

CROSS EXAMINATION

BY MR. ALTSHULER:

Q. Doctor, I ask you to assume the following facts:

That in 1937, three days before trial, James Bostic was examined by a competent psychiatrist, who determined that he was of sound mind and able to assist an attorney in defense of the charge pending against him of first degree murder and that he understood the nature of the charge pending against him.

That at the trial, three days later, Mr. Bostic was found to be guilty and was subsequently sentenced to death;

135 That in the following three years there were 21 stays of execution and he became of unsound mind, and psychotic. At that time he was examined by a psychologist, or shortly around that time, and according to a Stanford-Binet test, achieved a rating of -- IQ rating of 41;

That three months later, at St. Elizabeths Hospital, an IQ rating of 44 was indicated;

In 1947, at St. Elizabeths Hospital, an IQ rating, under a Wechsler test, of 85 was indicated; and in 1962, under a Stanford-Binet test, a rating of 70, and under a Wechsler test, a rating of 77.

Considering all these facts, assumed facts, Doctor, would you say that his mental condition in 1941 was his normal mental condition or level of intelligence? A. I would say that it could have been and probably was.

Q. In 1940, Doctor? A. In 1940 also.

Q. My question was directed, would you say that he was functioning at his normal level of intelligence in 1940, when he achieved a rating of 41 or 44? A. No, he was not.

Q. Would you say that was lower or higher than his normal intelligence level? A. I would say it was lower.

136 Q. Now, would you say that the lower level of intelligence rating was caused, in any substantial degree, by the fact that there were 21 stays of execution of the penalty of death and the fact that he was psychotic at the time the test was given? A. I would -- my opinion would be that his lower functioning at the intelligence level was due to the fact that he was mentally sick at the time.

Now, in all probability -- it is purely a supposition -- the first aspect of your question, as to whether it was due to the stay of execution or not, I would say that in all probability it was.

Q. Based on the same assumed facts, could you state an opinion whether Bostic was able to assist an attorney in regard to his trial and was he able to understand the nature of the charge pending against him in 1937? A. Well, of course, I can't definitely say because I didn't examine him in 1937, but --

Q. Can you use the word "possibility" or "probability?"

A. -- but I would say this, that here in 1940 -- 1960, or whenever it was that he had the subsequent psychological examinations, at that time his intelligence level was within normal range, let us say, and --

* * * * *

137 And then I would also say that, in all probability, he was functioning at about the same level at the time of the initial examination in 1937 or at the time that the crime was committed.

BY MR. ALTSHULER:

Q. I am referring specifically to the time of trial, which was in February of 1937.

If I understand you, I think you have been confused by some of your dates.

What would you consider his normal level of intelligence from what I have told you? A. I would consider his normal level of intelligence what was found to be the normal level of intelligence at St. Elizabeths Hospital subsequent to his recovery from his psychosis.

Q. And that would be the 85 in 1947? A. That would be what?

Q. The 85 IQ achieved in 1947? A. Well, whatever it was. I don't know what the findings were, but, at any rate, after he recovered he

138 achieved a level of intelligence with which he undoubtedly functioned prior -- at the time and very likely prior to the commission of the crime.

THE COURT: Well, then, you mean, that his normal level of intelligence would be in the 70s rather than 41; is that what you mean, Doctor?

THE WITNESS: Yes, that is what I mean to say, Your Honor.

BY MR. ALTSHULER:

Q. And do you believe that he was functioning in the level of around 77 to 85 at the time of his trial in 1937, rather than at 41 or 44?

A. I would be inclined to think so; yes.

* * * * *

REDIRECT EXAMINATION

BY MR. SKEENS:

* * * * *

140 Q. Now, sir, do I understand you correctly that it is your testimony that you believe that Bostic, during the trial in 1937, possessed about the same amount of intelligence as he did in 1947, while he was insane in St. Elizabeths Hospital? A. Yes, I would say that. All I am saying is that the mental age, the intellectual -- the intellectual functioning, the intelligence level of the individual during a period when he is mentally sick is apt to be interfered with, apt to be diminished by reason of his mental illness.

Q. Well, you are aware of the fact that the defendant Bostic in June was examined at Atlanta penitentiary, in the jail, are you not?

A. When was that?

Q. In June of this year, a few weeks ago. A. No, I wasn't aware of that.

Q. Well, sir, assuming that there were testimony here in Court or evidence presented that in June of 1962 Bostic was examined psychologically by a Simon Binet test, 1916 revision, and an IQ was returned of 70; now, would you say that that was approximately the mental intelligence of the defendant Bostic during his trial in 1937?

A. It could well have been; in all probability it was.

MR. SKEENS: All right. Thank you, sir.

* * * * *

141 RECROSS EXAMINATION

BY MR. ALTSHULER:

Q. Doctor, have you had any experience with epileptics? A. Yes, a good deal.

Q. In your opinion, could an epileptic go for a number of years without having a convulsive attack?

* * * * *

THE COURT: Let me put it this way: If a person who was originally an epileptic goes for a long period without an epileptic seizure, would that be an indication of the fact that he has recovered from his epilepsy?

THE WITNESS: As far as we know, Your Honor, so-called

142 idiopathic epilepsy -- which is actually a Greek term meaning we don't know what the cause of it is -- a person who has epilepsy has convulsive seizures. If he doesn't have convulsive seizures he doesn't have epilepsy. The absence of epileptic seizures would mean that he has recovered.

THE COURT: How long would it be necessary for a person to go without an epileptic seizure before the conclusion could be reached that he has recovered?

Isn't that what you are trying to get at?

MR. ALTSHULER: Well, I did have a couple of questions mixed in with that.

THE COURT: Well, I want to get at that, anyway.

THE WITNESS: I don't know. I don't know if there is any specific period. I would say --

THE COURT: In other words, suppose a person who had epilepsy goes for ten years without a seizure, would you derive the conclusion that he has recovered?

THE WITNESS: I would be inclined to say so, although let me point this out, Your Honor: An epileptic can have a seizure once a year or once a week or once every day, you see. So that obviously a

person who has epileptic seizures every day or every week, then he stops having them for ten years, I would say that that man has recovered. On the other hand, if he has it only once a year and he hasn't had it for
143 ten years, you would be hard put to know whether he has recovered or not.

THE COURT: You may proceed. I interrupted you, I think.

BY MR. ALTSHULER:

Q. Assuming these facts, Doctor:

That Bostic -- that 19 lay witnesses testified that James Bostic, from about the age of two or three up to, let's say, about the age of ten, had frequent convulsions or fits, and that he continued to have convulsions or fits throughout his teen age, but with less frequency, and that he continued to have some sort of fits even until a few months before the time of the alleged commission of the crime;

That from the time he was in jail, from 1937 to 1940, the jail physician testified he saw no indication of epilepsy, nor did he treat him in any way for epilepsy, and three jail guards testified that they observed no epileptic fits or convulsive fits;

That an electroencephalogram was given to the defendant in 1940 and another one in 1947, that neither of those tests indicated any symptoms of epilepsy. In fact, as one doctor testified in 1940,the test showed a perfectly normal wave;

That from the period of 1940 through 1948, while in St. Elizabeths
144 Hospital, the hospital, with the intention of observing Bostic for possible epilepsy, neither saw any symptoms nor treated him during that entire period;

And that the prison records at Atlanta, Georgia from the period of 1951 until early 1962, about eleven years, indicated neither treatment nor symptoms of epilepsy.

Would you say that you have here a case of an epileptic?

MR. SKEENS: I object, Your Honor. Mr. Altshuler has given all of the evidence at the 1940 lunacy inquisition, and a jury has rendered its verdict in that case of psychosis with epilepsy.

THE COURT: The jury rendered a verdict he was psychotic. The jury did not try the issue of epilepsy; it tried the issue of sound or unsound mind.

MR. SKEENS: That is the verdict, I believe, Your Honor.

THE COURT: No; I will overrule the objection.

BY MR. ALTSHULER:

Q. Based on the assumed facts as I --

THE COURT: Can you answer the question?

THE WITNESS: I think so.

THE COURT: You may answer.

THE WITNESS: I would say that the absence of the electro-
145 encephalogram is a very telling one. In 85 percent of the cases an epileptic is apt to have an abnormal encephalogram. I would say roughly 85. And if he doesn't, then you suspect your own diagnosis.

I must say that at the time I saw him myself, with the history which I had of these individuals who said that he had epilepsy in his early years, I thought that epilepsy might be playing a role. As I read over my testimony --

THE COURT: You thought what, Doctor?

THE WITNESS: That epilepsy might be playing a role in his psychosis. But I read over my own notes or testimony, I had that feeling, although I was not -- I didn't say definitely that he had epilepsy, but I felt that it may be playing a role.

From what you are telling me now, the very great likelihood is that he did not have epilepsy.

BY MR. ALTSHULER:

Q. In fact, you stated at the time, in 1940, did you not, Doctor, that you had serious doubts of whether he had epilepsy? A. Yes, I think so.

Q. May I ask you one further question, Doctor. Does the mere fact that a person has convulsions indicate to you that he is necessarily an epileptic? A. No, that doesn't necessarily indicate it.

146 Q. Are there any other causes for convulsions besides epilepsy? A. Yes, there are.

Q. Numerous causes? A. Oh, not numerous. There are a number of causes.

* * * * *

THE COURT: Doctor, epilepsy is not a mental disease, is it? It is not a form of insanity, is it?

THE WITNESS: Not necessarily; not necessarily. A great, probably most, epileptics are walking around on the streets and functioning --

THE COURT: Well, I was thinking of historic figures like Julius Caesar and Napoleon Bonaparte. Weren't they epileptics?

THE WITNESS: Yes,that is correct, Your Honor.

But at times epileptics do develop psychosis, more frequently than is true in the average individual.

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147 MARGARET IVES,

called on behalf of the Government, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALTSHULER:

* * * * *

148 Q. Would you state the results of the test in 1940 as given in St. Elizabeths Hospital?

MR. SKEENS: Objection, Your Honor. This witness --

THE COURT: Objection overruled.

MR. SKEENS: There is no testimony that this witness performed that test.

THE COURT: Beg pardon?

MR. SKEENS: There is no evidence that this witness performed that test.

MR. ALTSHULER: I am merely asking for the report of the test.

THE COURT: Objection overruled.

THE WITNESS: In 1944 -- 1940, the test given by Dr. Kendig, who was at that time the chief psychologist at St. Elizabeths Hospital, on this she obtained a mental age, on the Stanford-Binet Form L, of six years, eight months, with a resulting IQ of 44.

149 THE COURT: Let me have those figures again. Mental age of what?

THE WITNESS: Six years, eight months.

THE COURT: And IQ?

THE WITNESS: Of 44.

THE COURT: That was in 1940?

THE WITNESS: That was 1940, July 6th, 1940.

BY MR. ALTSHULER:

Q. And was that shortly after Bostic was committed to the St. Elizabeths Hospital following a verdict of unsoundness of mind?

A. That's right.

MR. SKEENS: Leading the witness. I object, Your Honor.

THE COURT: Objection overruled. You know objections in a non-

jury hearing of this kind are just not suitable, Mr. Skeens.

BY MR. ALTSHULER:

Q. Dr. Ives, did you perform a test, give an intelligence test to James Bostic in 1947 while he was at St. Elizabeths Hospital? A. Yes, sir, I did. I used the Wechsler-Bellevue, Form 1.

Q. And what was the IQ rating achieved --

150 THE COURT: Just a moment. Let me have the date of that.

THE WITNESS: That was given on November 17th, 1947.

BY MR. ALTSHULER:

Q. And what was the IQ rating obtained at that time? A. The IQ rating obtained at that time, as it was done at that time, was 85.

Q. And what level of intelligence, classification of level of intelligence would you grade that? A. That is within the dull normal range.

* * * * *

Q. Is that a classification which would indicate mental deficiency? A. No, sir.

Q. It's above that classification? A. It's above the mental deficient level, but it is inferior.

THE COURT: Did you have the mental age based on that test also?

* * * * *

151 THE WITNESS: Yes, I can give the mental age. It's around eleven years, the same as our friend told us yesterday.

BY MR. ALTSHULER:

Q. Can you say, Doctor, whether the IQ level as indicated by the test that you gave was the normal level of intelligence of James Bostic? A. I think so.

Q. Or was the 44 achieved back in 1940 the normal level of his intelligence? A. No, the first level, the level obtained on the second set of tests given in 1940 and subsequently in 1960 are, I believe, the normal level of functioning.

* * * * *

152 Q. Doctor, assuming that in 1962 James Bostic was given two intelligence tests, one of them a Stanford-Binet test 1916 type, in which

he achieved an IQ rating of 70; and around the same time he was given a Wechsler test, in which he achieved a rating of 77; would you consider those ratings as more indicative of his true level of intellignece, or would you consider the 44 IQ given in 1940 as more indicative of his true level of intelligence? A. I would consider the higher levels more indicative of his true level of intelligence.

Q. Is there any explanation that you have from your professional experience of why he achieved only a 41 or a 44 IQ rating in 1940 and subsequently much higher ratings in 1947 and 1962? A. There cannot be that much difference in rating unless the individual was at the time of the first tests either mentally ill or extremely disturbed.

Q. If I told you that at the time of the first test, Doctor, you were to assume that the man, Bostic, had received 21 stays of execution following sentencing to death and that he was psychotic at the time, would
153 that be an explanation of the low rating that he had in 1940? A. It could be, yes.

Q. Is it likely to be? A. I think so.

Q. If I told you to assume that in 1937, three days before he was tried on a charge of first degree murder, that James Bostic was examined by a competent phychiatrist, who determined him to be of sound mind and able to properly assist an attorney in defense of a first degree murder charge and that Bostic was able to understand the nature of the first degree murder charge, would you be able to voice an opinion as to the level or approximate level of Bostic's intelligence in February of 1937 at the time of his trial? A. If we are to accept -- if I am to accept the evidence that you give me of the psychiatric examination?

Q. Assuming those as facts. A. Yes. Then I think the chances would be that he would be functioning at or near his higher level rather than the lower level.

* * * * *

154 Q. At the time you gave your test in 1947 was Bostic mentally ill or psychotic at that time? A. As far as I could tell, he was not.

CROSS EXAMINATION

BY MR. SKEENS:

Q. All right, Doctor. Now, you say that, in assuming the hypothetical question placed before you by Mr. Altshuler, the pressure due to the executions that were then pending and being stayed would have brought Bostic's intelligence down lower than what it normally was? A. I say it well could have, yes.

Q. Well, then, can you tell the Court why, then, on July 6, 1940, a few months later, after the sentence was stayed and the defendant was committed to St. Elizabeths Hospital, and he was there examined psychologically and a report came in of 44 and a mental age of six years and eight months, when he was no longer under the strain of sentence by execution, why there was so very little difference between both psychological tests?

MR. ALTSHULER: I object to that. I think there is an assumption of fact there which is patently not -- he still was under sentence of death.

THE COURT: I think this is permissible cross examination, Mr. Altshuler.

155 I feel that both sides should be given more leeway than prescribed by the strict rules of evidence that we apply in jury trials. I think legally your objection may be well founded, but I am going to permit that.

MR. SKEENS: Thank you, Your Honor.

THE WITNESS: Well, certainly if he were so disturbed that his IQ had fallen 30 to 40 points -- which is most unusual -- one would hardly expect him to recover in a few months, regardless of what happened to him. It takes a long time to get over a psychosis; you don't get over it overnight.

BY MR. SKEENS:

Q. So, therefore, as far as you are concerned, the fact that several months go by and his entire environment is changed, from a jail to a hospital, where he is receiving medical treatment for a period of three months, there would be no difference in this man's mental intelligence at that time? A. I wouldn't expect much change in that time, no.

Q. Now, you keep referring to the higher levels of Bostic's intelligence, in your direct testimony. Now, can you tell us, on the basis of the questions and the assumptions that were given to you by Mr. Altshuler concerning certain psychological examinations held in 1962, can you tell us whether or not Bostic's level of intelligence, based on those assump-

156 tions of facts and your own investigation and your own examinations in this case, plus the two 1940 psychological tests, whether or not Bostic had ever been a mentally deficient or defective person? A. In my opinion, he had not been a mentally defective person because, by definition, a mentally defective -- a person is a mental defective only if this condition has existed throughout his lifetime or from a very early age; and in his case the mentally defective functioning only accompanied, apparently, the psychosis. We have no evidence that he ever functioned at a mentally defective level at any other time.

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157 BY MR. SKEENS:

Q. Now, Doctor, assume that there has been a Wechsler psychological test performed in June of 1962 and the IQ score on that particular test was 77, keeping in mind that the score Bostic achieved when you examined him while he was in an insane institution in 1947, as compared to the test performed in 1962 in the Federal prison, that being 77, and yours 85; can you account to the Court or give --

* * * * *

158 Q. -- and recognizing that there has been a 15-year lapse between your test and the 1962 test; how can you account or can you explain for the Court the lower intelligence quotient coming out of a test in 1962, 15 years previous to yours?

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THE COURT: Your question is so involved. Would you mind summarizing it? I did not follow it.

* * * * *

159 THE COURT: Well, then, why would a person get 85 in one test and 77 in a similar test fifteen years later?

Isn't that it?

THE WITNESS: That is the question.

MR. SKEENS: Yes.

160 THE COURT: Brevity is the soul of wit.

THE WITNESS: I don't know -- I think I can be brief in explaining this, too. The test has been restandardized since 1947, and I went to the trouble of rescoring mine on the present norms and I get 78. So, there is only one point difference in the two tests, which is no difference at all.

BY MR. SKEENS:

Q. So, then, your score, then, should be corrected and revised, according to present day standards under the Wechsler test, to a 78? A. In my opinion, that is more accurate, yes.

Q. All right. Thank you, Doctor.

Now, Doctor, you have also testified that when Bostic was under a pressure such as stays of execution in the electric chair, that it would reduce his ability to reason and his intelligence, functional intelligence, would naturally reduce; isn't that correct? A. I said it very likely would.

Q. Very likely. Now, can you tell the Court whether it would very likely, his intelligence, functionally, be reduced when he is under a strain or in the courtroom facing a charge of first degree murder in 1937? A. It could be. I would have to say that I don't know, but I

161 should think it could be, yes.

Q. So, therefore, his functional intelligence and ability to reason would obviously have been close to the IQ of 41 in 1940? A. Not obviously at all. I said it could be.

Q. It was likely, you said? A. It might have been.

Q. Yes. Now, Doctor, can you tell the Court whether or not, as a result of all of the information you have obtained in your examinations and the study of the records at the hospital and the penal institution, as to whether Bostic's mental intelligence improved at all from 1940 to the present time? A. His functional intelligence certainly improved a great deal.

Q. In what way?

THE COURT: What does that mean, functional intelligence?

THE WITNESS: How well he can answer questions on an intelligence test. Because when you are upset or psychotic, you cannot think. I think that is obvious to all of us. You cannot answer questions or reason or remember or do anything as well as when you are not under strain. Therefore, the score that you will get on an intelligence test when you are in that, that state will be very much lower, but you have to be very much
162 upset or psychotic.

BY MR. SKEENS:

Q. Now, you heard a hypothetical question from Mr. Altshuler telling you about testimony of a psychiatrist examining Bostic prior to trial and his conclusion was that Bostic was not insane, and you said assuming that fact his intelligence would have been within normal limits; is that correct? A. I said it would probably be closer to the present level if he were not psychotic.

Q. Yes. However, you also have stated that your accounting for the lower IQs of 1940 of 44 was due to the fact that he had a psychosis; isn't that correct? A. That's right. That's what I think.

Q. So then if his functional intelligence has improved greatly, as you have just testified, over the last 22-year period, it obviously would have been much lower in 1937 than what it is today; isn't that correct? A. No.

Q. Well, didn't you say, in response to a question of the Court and myself, that functional intelligence, as you defined that term, greatly improved over the past 22-year period? Didn't you say that? A. Since 1940. I didn't say anything about 1937.

163 Q. Since 1940 --

THE COURT: Let the witness finish her answer.

THE WITNESS: Functional intelligence has greatly improved to an extent of mental age rise of about five years since 1940.

BY MR. SKEENS:

Q. So we do have this substantial improvement over a 22-year period? A. That's right.

THE COURT: I would like to ask you a question. Perhaps the question is a little theoretical.

If a person's answers to the intelligence tests are affected by insanity or by the fact that he is under pressure, then is it a fact that you do not get his true mental age?

THE WITNESS: That is correct.

THE COURT: But later on, if he recovers gradually and reaches what is normal for him and you get a higher mental age, you could not say, could you, that his mental age is improved, but merely that you could not get his true mental age before, isn't that it?

THE WITNESS: That is correct. That is what I tried to explain, yes.

MR. SKEENS: I have nothing further, Your Honor.

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164 DAVID J. OWENS,

called on behalf of the Government, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

BY MR. ALTSHULER:

Q. Dr. Owens, at my request did you review the medical records at St. Elizabeths Hospital in regard to the defendant, James Bostic, who

165 was there from some time in 1940 through some time in 1949, I believe; is that correct? A. Yes.

Q. Now, in reviewing those records, Doctor, was there any indication that the hospital was aware of a possible previous history of epilepsy before the patient got to the hospital? A. Yes, there was a history of epilepsy prior to his admission to St. Elizabeths.

Q. Is there any indication in the record that the hospital observed any symptoms of epilepsy or gave any treatment for epilepsy to James Bostic from the period 1940 to 1949? A. No.

Q. In fact, is there a reference specifically that they did not notice any symptoms of epilepsy? A. Yes.

Q. Doctor, in your opinion, if a person is an epileptic of the grand mal type, would he go for a period of as much as eight years without having an epileptic attack? A. Without treatment I would say it would be highly unlikely that he would go eight years without a convulsion.

MR. ALTSHULER: I have no further questions of the Doctor.

* * * * *

166 THE COURT: I would like to ask the Doctor a couple of questions about another topic and I shall make him the Court's witness for that purpose so that either side can cross examine him.

Doctor, drawing on your training and experience as a psychiatrist, is it possible to determine today whether, on a specific date 25 years ago, a person who was being tried in court understood the nature of the proceeding in which he was involved?

THE WITNESS: I would say it would be impossible for me to determine today what a man's mental condition was 25 years ago, whether he was competent or, in fact, whether he was even mentally ill or not, without having conducted an examination.

I think had I conducted an examination at that time, that would be a different matter; but for a determination at this time as to a man's competency 25 years ago --

THE COURT: Because competency has to be as of a particular date.

Now, a person who is mentally ill can be competent on some days and not on others; isn't that so?

THE WITNESS: Yes, Your Honor. And then a person may be suffering from a mental illness and may still be competent for trial. He may

167 have a severe mental illness, schizophrenia, but competency, in my view, is such a narrow thing that it is difficult to pin competency down prior to the date of your examination, certainly by a matter of months, much less years.

THE COURT: However, if a person is a mental defective, that would be a permanent state, would it not?

THE WITNESS: Yes, Your Honor; if he is defective today he would have been defective 25 years ago.

THE COURT: In other words, if a person, say, is an imbecile today, he would have been an imbecile 25 years ago?

THE WITNESS: In my opinion, yes.

THE COURT: However, suppose today he has inferior intelligence but is not mentally deficient. Suppose he is in the lower level of normality. Could any inference be drawn as to whether he was competent to understand the nature of the proceedings against him?

THE WITNESS: I would say that if he is not defective today, then he would have not been defective 20, 25 years ago, and he would have not been incompetent on the basis of being a defective. He could have been incompetent on the basis of having some functional disease or disorder, but not on the basis of being a mental defective.

* * * * *

168 BY MR. ALTSHULER:

Q. Doctor, assuming that in this case James Bostic was examined by a competient psychiatrist three days prior to trial; and that approximately three years later he was psychotic, and given an intelligence testing and achieved an IQ rating of 41; could you state any opinion, Doctor, from that information, those assumptions alone, of whether the defendant in 1937, at the time of trial, three days subsequent to his psychiatric examination, was able to understand the nature of the first degree murder charge then pending against him and was able to properly assist an attorney in defense of that charge? A. It would be my impression that, if he had had a psychiatric examination three days prior to his trial and was found competent or, in the opinion of the psychiatrist, was able to understand the charges and assist counsel properly in his defense, then he would have been competent and that subsequent to this time he became ill.

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169 ROGER S. COHEN,

called on behalf of the Government, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALTSHULER:

* * * * *

Q. You are a Doctor of Medicine, a graduate Doctor of Medicine, specializing in psychiatry? A. That is correct.

Q. Are you also a diplomate? A. I am a diplomate of the Board of Neurology and Psychiatry.

Q. I understand, I think, Doctor, you were appointed -- an original member of the Commission on Mental Health when it was first originated in 1938? A. That is correct.

170 THE COURT: Will the Doctor's qualifications as a psychiatrist be conceded, Mr. Skeens?

MR. SKEENS: Yes, Your Honor.

* * * * *

171 THE COURT: You may proceed.

BY MR. ALTSHULER:

Q. Doctor, you examined James Bostic in 1937; is that correct? A. That is correct.

Q. At whose request did you make that examination? A. At the request of lawyer Sitnick.

Q. And he was defense counsel? A. He was.

Q. Did you receive any fee for that examination? A. Not a penny.

Q. When did you make that examination, on what date? A. That was made on February 5th, 1937.

Q. Do you recall where you examined Bostic? A. At the District of Columbia Jail on 19th Street, Southeast.

Q. And approximately how long did that examination last? A. Oh, it's hard to say, but those examinations, in general, lasted an hour and a half to two hours.

172 Q. Now, would you explain to us, Doctor, just what that examination consisted of? A. Certainly. I had a routine examination.

We started out with the family history, which in this case, of course, would not be very pertinent; with the past history of the patient,

his education, his occupation, his illnesses, including convulsions or any kind of seizures; with his marital state, with his sexual history.

We go on from there to what we generally speak of as the present illness, and the present illness in this case was the commission of the crime and the circumstances around it.

All the time that we are doing that, if we are any psychiatrist at all, we are observing the patient, his mood, his facial expression, his mannerisms, his manner of speaking. We note particularly whether he speaks relevantly and coherently, whether he makes good rapport with the examiner, whether he is responsive to questions, whether he seems to have difficulty in understanding the questions, and particularly the psychiatrist must notice whether he must use circumlocutions -- I shouldn't say this, I should say very simple expressions to get ourselves across to the person that we are examining, whether we have to use slang or obscene terms to make ourselves understood.

173 We, at the same time, look for the presence of delusions, hallucinations, what are called ideas of reference, for strange mannerisms in the patient, for strange beliefs.

This is followed by what is called the examination of the sensorium, which we start out with a determination of the patient's orientation to time, place and person; followed by a brief examination of his memory, which, of course, we have gotten to a certain extent in taking the history.

We are interested in his remote memory, his recent memory, and then what we call retention. We give the patient an address, we might say 125 Pennsylvania Avenue, and a color, and say, "In three minutes I am going to ask you that and see if you can repeat it to me."

Also in retention is the repetition of digits forward and backward.

Then we ask the patient to perform simple calculations, 8 times 9, 6 times 9, subtract 15 from 25, and so on; and then what we call serial subtraction, which we tell the patient to take 7 from 100 and to continue to take sevens from what he gets, all the way down.

After that we give the information, general information it's called, the name of the President of the United States and the name of the last --

it used to be, before Roosevelt's time, we asked the name of the last four Presidents, but after Roosevelt got in we found that the only thing

174 the young people could remember was Roosevelt.

However, in this case Roosevelt was President a second term, just in the second term, and perhaps I asked him -- I can't be sure -- the President before Roosevelt.

We asked him to name the months of the year, the days of the week, the prominent holidays of the year, and some of the large cities in the United States. That is what we mean by general information.

Following this there are some special tests that you might call abbreviated intelligence tests.

I want to say I did not do either a Stanford-Binet or a Wechsler on him. In fact, I am not even sure the Wechsler was in existence then.

Q. May I interrupt you at this point, Doctor?

Have you had any special training in the giving of intelligence tests?

A. I have. Most psychiatrists today can't give intelligence tests, but I happen to be of that vintage when psychiatrists had to give their own intelligence tests, when psychologists were as rare as hen's teeth; and we learned to give our own intelligence tests, and we gave the Stanford-Binet test, the 1916 test that one of the doctors referred to yesterday.

175 Well, this is just an abbreviated intelligence test, including what I mentioned before as a repetition of digits backward and forward. It would be asking him the difference between, say, a lion and a dwarf and a child, or we give him three words like "man, house, and fire" and ask him to make up a sentence containing those words, and also would be the interpretation of simple proverbs like "A stitch in time saves nine", or "Too many cooks spoil the broth", "A rolling stone gathers no moss."

Now, that was my routine.

I haven't quite finished, if Your Honor will bear with me.

THE COURT: Yes; proceed in your own way, Doctor. I am very much interested in this.

THE WITNESS: The neurological examination, of course, is important in these cases, and I might say I was also brought up in the time

when psychiatrists were taught to do a neurological examination, I am glad to say.

We looked at the pupils of the eyes. We got the movements of the eyes by moving the finger back and forth. We had the patient protrude his tongue and move it side to side. We looked for tremors of the face. We roughly tested the hearing. We found out whether there was vertigo or dizziness. We looked for tremors of the hands. We did the finger-

176 to-nose test with the eyes closed. We, of course, tested the superficial and deep reflexes. And, finally, we did what is known as a Rhomberg, with the patient standing with his eyes closed to see whether he swayed.

Now, that was my routine. I do not pretend to say that I can remember doing every one of these things to Bostic, but I have every reason to believe that I went through my usual routine.

BY MR. ALTSHULER:

Q. As a result of these combinations of tests, Doctor, did you determine in your own mind whether Bostic at that time was psychotic? A. As a result of my test, I came to the conclusion that Bostic was not psychotic.

Q. Now, in other words, you say he was of sound mind? Would that be a fair statement? A. That is perfectly true.

Q. When you say a person is of sound mind, could he then be -- well, I better not. I withdraw that question.

Was he aware at that time of the fact that he was charged with the charge of first degree murder? A. He was. And may I amplify that?

THE COURT: Yes, indeed.

THE WITNESS: The thing that I remember most distinctly, two

177 things I remember most distinctly about that examination, one was that I was surprised at the man's alertness and at least seeming intelligence. Had I been told that I was going to see a ditch digger or a common laborer with a fourth grade education, I would have been certainly surprised to find a man who was alert and as keen as he was; and if my recollection is correct, those were the two words that I used in reporting

to lawyer Sitnick, that he was unusually alert and keen. We think particularly in view of his deprived educational, cultural and emotional background. He impressed me as being, I would say, in slang, a smart guy. That was one thing.

The other thing that I remember most distinctly is the story of the slaying; and I would like to say that I remember his telling me he met Tuckson in a liquor store at 14th and L Street, the old part of Washington we call Swampoodle -- if His Honor remembers -- and that he and Tuckson got into a fight or an argument, rather, about a woman, and then Tuckson used an abusive term to him, the vulgar term meaning that he had incestuous relations with his mother, and that was something that apparently triggered Bostic's temper and he shot him. That I remember very distinctly.

Those are the two things I remember most distinctly at that time.

178 BY MR. ALTSHULER:

Q. You have stated, Doctor, that Bostic knew at the time you examined him that he was charged with first degree murder. In your opinion, did Bostic understand the nature of that charge? A. Of course.

Q. In your opinion also, Doctor, do you feel that Bostic was able to properly assist an attorney in defending himself against these charges? That is, was he able to consult with his attorney, ask questions and answer questions rationally, in defense of this charge? A. He was.

Q. Is there any doubt in your mind at all on that question?

A. There is none at all, and so I reported to Mr. Sitnick.

Q. Doctor, have you had any experience with epileptics?

THE COURT: Before you pass that, if I may make a suggestion.

MR. ALTSHULER: Certainly.

THE COURT: You asked the doctor whether Bostic was psychotic, and he said no. I wonder if you would want to ask the witness whether he found any mental deficiency in Bostic.

179 BY MR. ALTSHULER:

Q. Would you have classified Bostic at the time you examined him as a person who was mentally deficient? A. No, I decidedly would not

have. As I said a while ago, in colloquial terms I would have called him a smart guy. Not an educated man, obviously, but one whose native intelligence was not bad.

Q. Now, Doctor, the question I asked a moment ago: Have you had any experience with epileptics? A. Yes.

Q. And are you dealing with them at the present time in your duties in regard to the Veterans Administration? A. I am not dealing with a patient himself, I am dealing with records.

Q. If it's suspected that a person is an epileptic, what is the procedure followed? A. The procedure followed by the Veterans Administration is to hospitalize the patient and to observe him for the occurrence of epileptic convulsions. At the same time, he is not getting any medicine. And before the diagnosis of epilepsy is accepted by us he must be seen to have at least one epileptic convulsion. We do not take the affidavits of laymen as being very valid.

Q. Does the mere fact that a person has a convulsion, or what
180 appears to be an epileptic fit, mean to you, Doctor, that this person is necessarily an epileptic? A. I think you have asked me, if I may say so, a question begging the question. You say if he has an epileptic fit is he an epileptic.

Q. What appears to be. A. Oh; appears. Excuse me.

Q. If he has a convulsion or what appears to be an epileptic fit. A. No, of course not. There are very many conditions that cause convulsions without --

Q. Would you name a few of them, Doctor? A. Oh, well, we will start off in childhood, the acute diseases of childhood are often ushered in by convulsions. In the old days when typhoid fever was frequent, children would have convulsions at the beginning of typhoid fever. Meningitis is a frequent cause of convulsions. Another one is encephalitis.

Other conditions are brain tumors; general paresis of the insane; syphilitic insanity; old age, senile conditions cause convulsions.

Others are due to low blood sugar, hypoglycemia, hygoglycemic

reactions they are called.

Others are due to uremia.

181 And I say for the last -- the two that might explain these affidavits, one is hysterical convulsions or known as emotional fits, among the laity, and the others are alcoholic convulsions or alcoholic whiskey fits.

Q. How reliable, Doctor, is an electroencephalogram test in determining the presence of epilepsy? A. At the present time they are quite reliable. I don't know that I could give you a percentage. Of course, you realize that in 1937 I don't think there was an electroencephalographic machine in the City of Washington. I asked this question before I came here and I was told that in that year the first encephalogram was just being constructed at St. Elizabeths.

Q. Assuming, Doctor, in the case of James Bostic, that he was given an electroencephalogram test in 1940 and subsequently in 1947 and that neither test indicated the presence of epilepsy; and that from the period of 1940 to 1949, while at St. Elizabeths Hospital, the medical records there indicated neither symptoms of epilepsy nor treatment for epilepsy; and that the prison records at Atlanta, Georgia from the period of 1951 until the present time indicated no symptoms or treatment for epilepsy.

Would your opinion be that James Bostic was an epileptic? A. My

182 opinion would be that it reaches the supreme ranges of incredulity to think that a man would have been an epileptic for years and then for it suddenly to disappear without any treatment. It would be a case for a medical Ripley Believe It Or Not.

MR. ALTSHULER: I have no further questions.

THE COURT: Mr. Skeens.

CROSS EXAMINATION

BY MR. SKEENS:

Q. Now, Doctor, when did you first learn that you might possibly be a witness in this case at this hearing? A. That was March 27th, 1961.

Q. Now, since that time have you had occasion to meet with and talk with Mr. Altshuler, other than before the hearing here in this court?

A. I met Mr. Altshuler, I believe it was, last either Wednesday or Thursday. He came to see me at my office. Mr. Altshuler did not call me in March, 1961.

Q. Now, isn't it true, Doctor, that you have exhibited an unusual interest in this particular case? A. That is for you to decide.

Q. Well, I mean, haven't you been a little more active than the other doctors who testified in this case? A. That is for you to decide.

183 THE COURT: Mr. Skeens, I never permit a question which would call upon a witness to compare his own testimony with testimony of some other witness, or compare his own work with the work of somebody else.

MR. SKEENS: I am developing bias and hostility.

THE COURT: Well, you are not. I do not permit that kind of a question.

THE WITNESS: I think I know why he asked that question and I want you to know, Your Honor, and I don't want to be interrupted.

I was sitting in Mr. Altshuler's office two days ago after having lunch. I was reading the recent decisions of the Supreme Court with much interest, when this lawyer over here came in and began to talk to me about the Bostic case.

I am not so young and naive as not to know a fishing expedition when I see it, and he made a good many remarks about that Bostic case to me when he found out who I was. He didn't know who I was; rather surprised. He had me mistaken for one of the Atlanta psycholgists.

And after I heard three or four remarks on his part my hostility was aroused and I said to him, "There is no use your talking to me if you are just trying a fishing expedition." And I think this is what he is referring to.

184 I had met this type of lawyer many times before.

BY MR. SKEENS:

Q. And what type of lawyer am I, sir? A. Who engages in fishing expeditions with a witness.

Q. Did I ask you a single question concerning your testimony in the Bostic case? A. You didn't ask me a question, but you put out the bait.

Q. What kind of bait did I put out? A. I will tell you what you said. You said, "I have worked hard on this. I don't think Bostic belongs in the Atlanta penitentiary. I think Bostic should be tried by the Commission on Mental Health." And I was supposed to say yes or no.

I am not quite as naive as I look to you. I know a fishing expedition, and I told you so.

And if that is what you call hostility, yes, I felt hostility towards you.

Q. In fact, you had been quite concerned about Mr. Altshuler's preparation for this case and you were quite interested in helping him -- A. I was concerned with my preparation for the case because I knew that I was an important witness, if I may say so.

185 Q. You felt that way? A. I believe I am an important witness because I was the one that examined him three days before the hearing.

Q. Yes. And you also coached Mr. Altshuler on how to present the evidence with the other doctors, didn't you? A. No.

Q. You deny you did that? A. Yes.

Q. And you deny you talked to the other psychiatrists from Atlanta at length concerning this case? A. We discussed the case --

THE COURT: Were there any psychiatrists from Atlanta here?

MR. SKEENS: Psychologists.

THE COURT: You said psychiatrists.

MR. SKEENS: I am sorry.

THE WITNESS: Yes, we discussed the case. Of course we did.

BY MR. SKEENS:

Q. And you asked them what their conclusions were as a result of their examination? A. I saw what their conclusions were before I ever met them. Mr. Altshuler, when he came to my office at the Veterans Administration last week, showed me what their IQs were. I didn't prompt

186 them at all.

Q. So you were pretty well prepared for this case, weren't you? A. I am always prepared for cases.

THE COURT: I hope every witness and every counsel who comes

before this Court is well prepared.

BY MR. SKEENS:

Q. In fact, you have summarized, in effect, all of the testimony that has been given here the past three days, haven't you?

THE COURT: I am going to exclude that question.

You know, one of the functions of the Court is to protect witnesses against affront and insult.

MR. SKEENS: I will note my objection, Your Honor, if I am not permitted to go further on this question.

THE COURT: You may go further, but you must treat every witness with courtesy and respect. You know, sometimes --

MR SKEENS: I don't believe I have been discourteous.

THE COURT: Sometimes the legal profession has been criticized for discourteous treatment of witnesses, and there has been some basis for that criticism.

I am not referring to you personally, but to lawyers generally. I
187 think sometimes judges have not sufficiently protected witnesses against that sort of thing and that has cast some discredit on the legal profession.

Now, I feel that it is my duty, when the situation arises -- it does not arise too often, fortunately -- to protect a witness against discourteous or sarcastic questions. I think that is especially important when we have a professional man on the witness stand. If you were testifying, Mr. Skeens, I would protect you against that type of question.

BY MR. SKEENS:

Q. Now, it's a matter of fact, Doctor, that you hardly remember anything specifically that you talked about with Bostic 25 years ago?
A. I have already given in direct questioning what I remember.

Q. And anything that you said that Bostic told you is really what you read when Mr. Altshuler asked you to read this trial testimony; isn't that right? A. That is not so. You are distorting the question, Mr. Skinks.

Q. Didn't you -- A. Just a minute. I am going to answer your

question. I don't want to be interrupted.

I said a few minutes ago what I remembered particularly about the
188 case, and that was his mental condition; that is, his being a smart, alert man. And I also remembered the fight that took place that led to the murder, the argument and the fight.

I don't pretend to remember more than that, but you can't take that away from me.

Q. Now, didn't Mr. Altshuler ask you to read Bostic's testimony at his trial and the confession? A. No, he did not. I haven't read it. I never have read it.

Q. You know he had the other two doctors from Atlanta read that testimony, don't you? A. I heard so when I was sitting here yesterday, but I didn't read it. I have told you now once I didn't read it. I am here under oath and you will have to believe me.

Q. And he has also shown you two reports from Atlanta psychiatrists, hasn't he? A. He showed me the conclusion.

Q. I mean psychologists; excuse me. A. I saw the conclusions, which didn't surprise me at all.

Q. Yes. Now, you say that Bostic in 1937 was unusually alert, keen, and a smart guy? A. That's exactly what I said.

189 Q. Now, do you recall the testimony of the two psychologists in 1962 and their reports, which are in evidence here, in which Dr. Greene, a psychologist, says in 1962 on the more difficult tasks he required encouragement to secure his highest level of potential performance? Now, sir, does that strike you as a man who in 1937 was unusually alert and keen, and a smart guy? A. Yes, it does.

THE COURT: Just a moment, Doctor.

I am going to exclude that question. You have a right to confront any witness with his own prior statements. You do not have the right to confront him with some other witness' statements.

Now, it is for the Court to weigh the witness' statements.

BY MR. SKEENS:

Q. All right, sir. Now, you said that you conducted certain tests

with the defendant Bostic. You gave him numbers and asked him to repeat them? A. Repetition of digits, forward and backward, yes.

Q. All right. Now, according to your testimony that he was sane at the time that you examined him and keeping in mind that there has been a finding in this case that Bostic was insane, suffering with psychosis in 1940; would he be able to answer questions clearly and correctly, as

190 he did for you in 1937, as he would in 1940? A. I am confused.

THE COURT: Read the question. I am a little bit perplexed by it, too.

MR. SKEENS: I will rephrase it.

BY MR. SKEENS:

Q. Let's assume that a psychologist administered such a digit test on Bostic in 1940. A. You mean the repetition of digits, backward and forward?

Q. Yes. Could he or should he have answered them the same way as he answered them for you in 1937? A. That is speculative. I mean to say there are very many variables in such a performance. The co-operation of the patient is one. There are other variables. But one would suppose, in general, that there wouldn't be a great deal of difference between 1937 and 1962.

Q. All right, sir. I will read to you from the transcript, page 359, testimony where Dr. Watts stated:

"And then I said to the individual" --

A. This is not the 1962 examination?

Q. This is 1940, sir. A. Well, don't try to mislead me. This was in nineteen -- you asked me about the 1962 examination. Now you

191 shifted --

Q. No, sir. I asked you about 1940. A. Well, then, I misunderstood your question.

Q. Between 1937 and 1940. A. I misunderstood you.

Well, let me correct myself. May I, Your Honor.

THE COURT: Surely.

THE WITNESS: Well, of course, there is a difference between

1937 and 1940. We all know, as the Judge here, as well, expressed it, the suspense and tension hanging over him in those 19 reprieves would make a whale of a difference.

BY MR. SKEENS:

Q. So then you think because of those factors if he was asked to say numbers 8526, it would be normal for him to come up 6528, on account of these interferneces? A. You mean, saying it backward?

Q. Yes. A. Well, I think it's been brought out repeatedly that in 1940 Bostic was found to be of unsound mind, and we would not expect the same performance in 1940 that we would expect in 1937 when he was not of unsound mind.

Q. Well, sir, you don't mean to suggest that an insane person can't count or can't read a newspaper? A. Now, just a minute. You

192 are going tangentially to your question. You were talking not about reading a newspaper or counting. We are talking about a specific performance, namely, the repetition of digits.

Now, would you ask your question again?

Q. I am talking about performance by an insane person, sir. Can an insane person read a newspaper and understand it? A. We are away from the digits now, are we?

Q. Yes. A. Of course -- we will put it not in the category that all insane persons can read newspapers or, the logical contradictory, no insane persons can read newspapers. I will answer it by saying that some insane persons can read newspapers.

You won't get me to make a hundred percent generalization about insane persons. That is too broad and comprehensive a term.

Q. Now, do you think that a person that was sane in 1937 and then is found insane in 1940 is not capable of reversing four digits and asked to repeat them in reverse order? A. He may, or may not. I can't tell. In 1937 he could repeat the digits forwards and backwards. In 1940 he is insane; he may or may not. I can't make a generalization.

193 Q. And your testimony is that Bostic keenly and intelligently passed all of these tests for you? A. I did not say that. Please don't put words

in my mouth.

Q. What did you say, sir? A. I said he was keen and alert and smart. I did not make the statement that he passed all of the tests I gave him.

Q. Well, which test did he fail? A. I don't remember, and I don't pretend to remember.

Q. How old was Bostic, if you recall, when you examined him? A. Well, if he is 49 now, that was 25 years ago -- I think I can still subtract -- he was 24.

Q. I believe the record shows he is 42, according to the report -- 52, according to one of the reports. A. Then he was 27.

Q. Now, sir, when you examined him did he seem to be behaving like a normal, average 27-year-old person? A. Yes.

Q. You will stand on that answer? A. Yes.

Q. That's all. A. I want to qualify it; considering his background.

Q. That's all.

194 MR. SKEENS: I have concluded, Your Honor.

THE COURT: Anything further?

MR. ALTSHULER: I would like the Doctor to explain that last answer. I don't think he finished it.

REDIRECT EXAMINATION

BY MR. ALTSHULER:

Q. You said he behaved as a normal average person; and what was the rest of your answer?

THE COURT: Considering his background, the Doctor said.

THE WITNESS: In consideration, as I mentioned before, of his deprived background.

BY MR. ALTSHULER:

Q. And I believe you said previously that, when you described him as keen, that was also in relation to a man of his background also?

A. That is what I meant, a ditch digger or common laborer with a fourth grade education, he was far above the average of that type.

MR. ALTSHULER: I have nothing further.

THE COURT: Thank you, Doctor, The Doctor may be excused.

THE WITNESS: Thank you.

(Witness excused.)

195 THE COURT: Does that conclude your testimony?

MR. ALTSHULER: That concludes the Government's testimony.

THE COURT: Do both sides rest, or do you have anything further?

MR. SKEENS: No rebuttal, Your Honor.

* * * * *

MR. SKEENS: Well, one thing, Your Honor, I think I discussed this with Mr. Altshuler, and it is a question of these fees for these doctors. Now, I would like to have the witnesses, all of them, paid as any other expert witness is paid, by the U. S. Government, the same rates and the same manner. Mr. Altshuler is making arrangements for payment of his witnesses through the Department of Justice, as I understand it.

THE COURT: Yes.

MR. SKEENS: We have here an affidavit of forma pauperis, showing that Bostic is a pauper, an indigent; and it appears that I could not avail myself of the same privilege of getting the Department of Justice to pay these fees.

THE COURT: What are you requesting the Court to do?

196 MR. SKEENS: That an order be entered providing for payment of the experts of the defendant upon the same scale and same method as a Government witness.

THE COURT: Well, whom do you expect to make the payment?

MR. SKEENS: Whom do I expect? The Administrative Courts of the United States.

THE COURT: No, I don't think so. I do not feel that I can properly make such an order. I have always declined to let a defendant choose his own expert and have the Government pay for it. But, in any event, I do not think I have a right to make such an order nunc pro tunc.

What do you say about that, Mr. Altshuler?

MR. ALTSHULER: I am afraid I would have to check. I don't know enough about the legal difficulties of this.

THE COURT: You may make an application and I will pass upon it in due course, but I won't pass upon it offhand.

Do counsel care to have an oral argument, or not? It is in the discretion of counsel.

MR. SKEENS: I don't think that we could summarize this any better by oral argument than what Your Honor has, already. I assume that Your Honor will read the --

THE COURT: I have all that.

MR. SKEENS: -- the 1940 lunacy transcript and the 1949 --

197 THE COURT: I have all that.

MR. SKEENS: And 1949 of Drs. Perretti and Gilbert, who are not available at this time for testimony.

THE COURT: I have all that.

I will hand down my views in writing in a few days.

* * * * *

[Filed July 6, 1962]

OPINION

Edward J. Skeens, of Washington, D.C., for the defendant, for the motion.

David C. Acheson, United States Attorney; and Oscar Altshuler, Assistant United States Attorney, both of Washington, D.C., for the plaintiff, opposed.

This is a motion under 28 U.S.C. §2255, in behalf of a defendant, who was convicted of murder over twenty-five years ago, to vacate the sentence on the ground that he was mentally incompetent to stand trial.

On February 9, 1937, the defendant James Bostic was convicted of murder in the first degree, after a trial before the late Honorable

James M. Proctor, then a judge of this Court, and a jury. On March 19, 1937, the defendant was sentenced to death by electrocution. The conviction was affirmed by the Court of Appeals, 68 App. D.C. 167. Some years later, the President commuted the sentence to imprisonment. The defendant is serving this sentence at the Atlanta Penitentiary.[1/]

On October 24, 1960 -- more than 24 years after his conviction --, new counsel filed a motion under 28 U.S.C. §2255, to vacate the sentence on the ground that the defendant back in February 1937 had been mentally incompetent to stand trial. This Court, after a preliminary argument and an examination of all files and records of the case, denied the motion without a full hearing, 192 F. Supp. 170. The Court of Appeals held that the defendant was entitled to a hearing, 298 F. (2d) 678, Judge Burger strongly dissenting. Accordingly, such a hearing has now been held. Almost a day and a half was devoted to the taking of tesitmony.

Obviously, the burden of proof on a motion to vacate a sentence under 28 U.S.C. §2255 is on the moving party, because there is a presumption of regularity of the conviction. The burden is particularly heavy if the issue is one of fact and a long time has elapsed since the trial of the case. While neither the statute of limitations nor laches can bar the assertion of a constitutional right, nevertheless, the passage of time may make it impracticable to retry a case if the motion is granted and a new trial is ordered. No doubt, at times such a motion is a product of an afterthought. Long delay may raise a question of good faith.

Actually, an attempt to determine the mental condition and understanding of a human being on a specific date twenty-five years ago, is a formidable task bordering on the fantastic and the bizarre. The subject of mental competency to stand trial presents a much more difficult and complex problem than a determination of the question whether a person was suffering from a mental disease or was afflicted with a mental

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1/ The intermediate proceedings in this case are fully summarized in a prior opinion of this Court. United States v. Bostic, 192 F. Supp. 170.

defect on a particular date in the distant past. The presence or absence of mental disease or mental defect is solely a medical matter. On the other hand, competency to stand trial, which involves capacity to understand the nature of the proceedings and to advise with counsel comprises additional factors. A person suffering from a mental disease may, nevertheless, be able to comprehend the nature of the proceedings against him and consult with counsel. This occurs frequently.[2/] Moreover, at the time immediately preceding and during his trial, an afflicted person may have a lucid interval or be in a temporary state of remission. Accordingly, Dr. David J. Owens, of the staff of Saint Elizabeths Hospital, testified at this hearing that it is not practicable for a psychiatrist who examines a person several years after the event, to express an opinion whether at the earlier date that person was competent to stand trial.

It so happens, however, that in this instance, clear and convincing evidence on this point was available. While the burden of proof was on the moving party and accordingly counsel for the defendant presented evidence in support of the motion, the Court as a matter of convenience, will review the evidence introduced by the Government in opposition to the motion, before summarizing that adduced in support of the application.

Dr. Roger Cohen, a psychiatrist, testified that he had been retained by trial counsel for Bostic, to make a mental examination, and that he conducted such an examination on February 5, 1937, -- a few days before the original trial. Dr. Cohen further testified that as a result of a through mental, psychological and neurological examination he reached the conclusion that Bostic was of sound mind at that time. The Doctor stated that although Bostic was not an educated man, he was intelligent and "keen,

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2/ "Presence of a mental illness does not equate with incompetency to stand trial." Fegner v. United States, (C.A. 8th) 302 F. 2d 214, 236. To the same effect, Winn v. United States, 106 U.S. App. D.C. 133, 135.

alert and smart". He expressed the opinion that Bostic comprehended the nature of the murder charge and was able to consult with counsel. He indicated that he had a vivid recollection of the story of the slaying as told him by Bostic.

Mr. Joseph Sitnick, a member of the bar who was counsel for Bostic at his trial, testified at a lunacy inquisition in May, 1940. His testimony was made a part of the record on this motion. The pertinent portions of his testimony are as follows:

"Q. Were you able to confer with Bostic and prepare a defense for him?

A. Yes, sir.

"Q. From the information he conveyed to you?

A. Yes, sir." 3/

At his trial Bostic took the witness stand and testified in his own behalf. This Court has read the transcript of his testimony. It indicated that Bostic is not a well educated man and makes grammatical errors of the type frequently found among persons such as he, as for instance the use of verbs in the third person singular when the first person is proper. This circumstance obviously casts no reflection on his sanity, or his mentality. He was subjected to direct, cross and re-direct examination, and gave his version of the murder. Apparently by his story, he sought to support a theory of self-defense. His testimony was well connected and intelligent.

There were no other witnesses called by either side at the hearing on this motion who had an opportunity to observe Bostic at or about the time of his trial. The testimony just reviewed is conclusive that he was competent to stand trial.

There is a silent but eloquent circumstance that looms large in support of this conclusion. The experienced trial judge, who is now

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3/ Under the circumstances of this case, such testimony was not barred by the attorney-client relation, United States v. Wiggins, 184 F. Supp. 673, 677-678, and cases there cited.

deceased, had an opportunity to observe and listen to Bostic for a considerable period of time. It might have been otherwise if Bostic had not taken the witness stand but had remained silent. Manifestly, it is reasonable to assume that Judge Proctor would have noticed any mental inability on Bostic's part to comprehend the nature of the charge, or to participate in his defense. Obviously, if Judge Proctor had any doubt on the matter, he would have suspended the trial in order to subject the defendant to a mental examination. The opportunity of the trial judge to listen to the defendant at the trial has been deemed an important and weighty circumstance. United States v. Langston, (W.D. Pa.) 204 F. Supp. 323, 324.

It seemed to this Court that it might be helpful to conduct an examination of the defendant at this time in order to determine whether he has any mental defect, since ordinarily mental deficiency, unlike a mental disease, is a permanent state and consequently if a person is an imbecile today, presumably he must have been an imbecile twenty-five years ago. Accordingly, such examinations were conducted by two psychologists, each acting separately. Dr. Lawrence Bryan, a clinical psychologist at the Atlanta Penitentiary, where Bostic is confined, testified at this hearing that he had examined Bostic about ten days previously; that while Bostic was of inferior intellect, Bostic was not mentally deficient, but was within the lower range of normality, with an intelligence quotient of 77.

Dr. James E. Greene, another psychologist, testified that he recently examined Bostic and found the latter to be within the lower range of normality, and above the level of a moron. His test showed an intelligence quotient of 70.

Dr. Margaret Ives, a psychologist at Saint Elizabeths Hospital, testified that she examined Bostic in November 1947, when he was an inmate of that institution, and found him to be above the level of mental deficiency. He was of a dull normal age with an intelligence quotient of 85, which as revised under present standards would be equivalent to 78.

Counsel for the defendant introduced evidence that late in 1940, after Bostic had spent over three years in a death cell in the District of Columbia Jail awaiting execution, which was postponed numerous times, he became insane and as a result of a lunacy hearing held in 1941 was transferred to Saint Elizabeths Hospital. [4/] It might be mentioned at this point that he later recovered his sanity; [5/] that his death sentence was commuted; and that he was then transferred to the Atlanta Penitentiary.

At the time of the lunacy proceeding in 1940, it was found that Bostic had an intelligence quotient of 41 which would have rated him as an imbecile. Testimony was introduced to the effect, however, that a person who is psychotic, or who is under a severe mental strain, such as one under a death sentence awaiting execution, does not function at his normal mental level, and may make a very poor showing on a test of his mental capacity. Dr. Bryan expressed the opinion that at the time of his trial Bostic must have had a higher intelligence quotient than 41. Dr. Ives advanced the view that in 1940, Bostic must have been mentally ill and greatly disturbed, and that this condition accounted for the poor results of the mental test made at that time.

4/ Unfortunately, it is a frequent occurrence that a death sentence imposed by a Federal or a State court is neither carried out nor set aside for several years to come and in the meantime, the defendant languishes in a death cell. It is not surprising that the mental agony and torture caused by the prolonged suspense may result in a mental breakdown. No one is to blame for this deplorable situation, but the fault seems attributable to the system. That these delays are not necessarily an inherent feature of Anglo-American jurisprudence, is demonstrated by the fact that in England ordinarily, a death sentence is finally disposed of , either by being carried into execution, or by being set aside or commuted, within six weeks after it is imposed.

5/ After the staff of Saint Elizabeths Hospital determined that Bostic had recovered his sanity, he was transferred back to the District of Columbia jail and the matter came before me on an application by the United States Attorney that a new date be set for his execution. I suggested informally that steps be taken to secure a commutation of his sentence, and this was done.

Counsel for the defendant called Dr. Emery Y. Williams, a psychiatrist, who had examined the defendant in 1940 in connection with the lunacy proceeding then brought against him. Dr. Williams was in doubt whether Bostic could understand the nature of the proceedings in February, 1937, or could help his lawyer at that time. Admittedly, Dr. Williams had not seen him prior to 1940. Dr. Calude Carmichael was also called in behalf of the defendant. He had been a general practitioner and was only beginning work in psychiatry in 1940, when he assisted Dr. Williams in examining Bostic. Dr. Carmichael had not seen Bostic previously. Nevertheless, he expressed the opinion at this hearing that in February, 1937, Bostic had been unable to understand the nature of the proceedings against him or to consult with counsel.

Dr. Frederick Watts, a psychologist, who also examined Bostic in 1940 in connection with the lunacy proceeding, suggested with apparent hesitancy that Bostic had been unable to understand the nature of the murder trial or to assist his counsel. On further questioning, however, he qualified his answers by saying that when examined by him Bostic was under great pressure and may not have functioned normally. Dr. Watts also stated that in his opinion Bostic in 1937 had been able to answer counsel's questions and make suggestions.

On the basis of the foregoing evidence the Court finds as a fact that the defendant has not sustained the burden of proof on the contention that he was mentally incompetent to stand trial in February, 1937. On the contrary, the Court affirmatively finds as a fact that the defendant was competent at that time to understand the nature of the charge and the proceedings against him, and to make his defense and consult with counsel and, therefore, was mentally competent to stand trial. Accordingly, the motion to vacate the sentence is denied.

Actually, to vacate the sentence after a lapse of twenty-five years on the basis of this record and under the circumstances of this case would be a mockery of justice. No doubt, because of the passage of time the Government would be helpless to retry the case if a new trial were ordered. This proceeding presents one of the many striking illustrations of the

misuse and the distortion of 28 U.S.C. §2255. Under ordinary circumstances, after a defendant has been accorded his constitutional right to a trial by jury, and has been convicted; and then has been granted his statutory right to an appellate review and the conviction has been affirmed, the case should be at an end. The maxim "interest reipublicae ut sit finis litium" should be as potent and effective now as it has been in the past.

The legislation, which eventuated in 28 U.S.C. §2255 was drafted by an eminent Committee of the Judicial Conference of the United States, headed by the late Judge Parker. It was the intention of the Committee to provide a judicial remedy in lieu of a writ of habeas corpus for the unusual and extraordinary case in which a miscarriage of justice has taken place. It was not the purpose of the framers of the measure to furnish an additional mode of routine review of convictions in criminal cases. Nevertheless, the Federal courts have been flooded with such applications, generally originated by prisoners in propria persona, but at times initiated by counsel.[6/] While very few of these motions result successfully, they create a heavy burden on the courts. Perhaps it is not of any public interest that the labors of individual judges are increased by these proceedings, but it should be of some concern that in busy districts, especially in metropolitan centers, time is devoted to these hearings that would otherwise be used in trying cases on the regular

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6/ In this case the defendant tried to retain his present counsel for the purpose of beinging a proceeding to accelerate his parole eligibility date. Counsel suggested that he would file a motion to set the conviction aside on the ground of mental incompetency to stand trial. (See 192 F. Supp. 170, 173, 2d column, last paragraph.) In other words, this motion originated in the mind of counsel. No indication has been found in the voluminous record of this case that Bostic himself has ever claimed on his own initiative that he did not understand the nature of the proceedings against him, or felt that he was mentally handicapped in presenting his defense. Bostic did not join his counsel in signing the present motion, and no affidavit sworn to by him is attached.

docket.[7] Many judges during the past few years have made adverse comments on this situation.[8]

In Johson v. United States, (C.A. 9th), 267 F. 2d 813, Judge Pope suggested that there is a need to build some safeguards into the statute in order to protect the courts against such abuses of process. This suggestion is well founded. It perhaps might be effectuated by Congressional legislation that would confer broader discretion on district judges to grant or deny hearings on such applications.

Motion to vacate sentence is denied.

/s/ ALEXANDER HOLTZOFF
United States District Judge

July 5, 1962.

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[7] For example, in the present instance, this Court suspended the trial of civil jury cases for a day and a half, in order to conduct the present hearing.

[8] See McKenna v. Ellis (1959, C.A. 5th) 263 F. 2d 35, dissenting opinion by Judge Hutcheson; Johnson v. United States, (C.A. 9th) 267 F. 2d 812; Baker v. United States, (C.A. 9th) 287 F. 2d 5, 7.

[Received October 20, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
	)	
vs.	)	Criminal No. 58,600
	)	
JAMES BOSTIC	)	

NOTICE OF APPEAL

Name and address of appellant: JAMES BOSTIC, Reg. No. 7127 - A
PMB, U. S. Penitentiary
Atlanta 15, Georgia

Name and address of appellant's attorney: EDWARD J. SKEENS,
201 Barr Building
910 - 17th Street, N.W.
Washington 6, D.C.

Offense: First Degree Murder

Concise statement of judgment or order, giving date, and any sentence:

Sentenced to death by electrocution. Sentence commuted to ninety-nine years by presidential commutation.

Name of institution where now confined, if not on bail: U.S. Penitentiary
Atlanta 15, Georgia

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the ~~above stated judgment.~~ denial of a Motion to Vacate Judgment pursuant to Title 28, U.S. Code, Section 2255 on July 5, 1962. Pursuant to order of the United States Court of Appeals for the District of Columbia dated October 12, 1962, and miscellaneous no. 1991, the appellant has ordered a complete transcript of the hearing held on June 26, 27, and 28, 1962.

Dated October 19, 1962.

JAMES BOSTIC
Appellant

/s/ EDWARD J. SKEENS
Attorney for Appellant.